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ABSTRACT

This document comprises eight federal court decisions pertinent to public school desegregation: (1) "Brown v. Board of Education," 347 U.S. 483 (1954); Mr. Chief Justice Warren delivered the opinion of the Supreme Court; (2) "Bolling v. Sharpe," 374 U.S. 497 (1954); Mr. Chief Justice Warren delivered the opinion of the Supreme Court; (3) "Brown v. Board of Education," 349 U.S. 294 (1955); Mr. Chief Justice Warren delivered the opinion of the Supreme Court; (4) "U.S. v. Jefferson County Board of Education," 372 F. 2d 836 (1966); Circuit Judge Wisdom delivered the majority opinion of the United States Court of Appeals for the Fifth Circuit; District Judge Cox delivered a dissenting opinion; (5) "U.S. v. Jefferson County Board of Education," 380 F. 2d 385 (1967), Certiorari denied 389 U.S. 840 (1967); on March 29, 1967, the United States Court of Appeals Fifth Circuit held that school boards have an affirmative duty to bring about integrated, unitary school systems; (6) "Green v. School Board of Virginia," 391 U.S. 430 (1968); Mr. Justice Brennan delivered the opinion of the Supreme Court; (7) "Swann v. Board of Education," 402 U.S. 1 (1971); Mr. Chief Justice Burger delivered the opinion of the Supreme Court; and, (8) "Board of Education v. Swann," 402 U.S. 43 (1971); Mr. Chief Justice Burger delivered the opinion of the Supreme Court. (JM)

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92d Congress }
2d Session }

COMMITTEE PRINT

LEADING COURT DECISIONS PERTINENT TO PUBLIC SCHOOL DESEGREGATION

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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EDUCATION & WELFARE
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BROWN ET AL. *v.* BOARD OF EDUCATION OF TOPEKA ET AL.

NO. 1. APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS†

Argued December 9, 1952.—Reargued December 8, 1953.—
Decided May 17, 1954.

Robert L. Carter argued the cause for appellants in No. 1 on the original argument and on the reargument. *Thurgood Marshall* argued the cause for appellants in No. 2 on the original argument and *Spottswood W. Robinson, III,* for appellants in No. 4 on the original argument, and both argued the causes for appellants in Nos. 2 and 4 on the reargument. *Louis L. Redding* and *Jack Greenberg* argued the cause for respondents in No. 10 on the original argument and *Jack Greenberg* and *Thurgood Marshall* on the reargument.

On the briefs were *Robert L. Carter, Thurgood Marshall, Spottswood W. Robinson, III, Louis L. Redding, Jack Greenberg, George E. C. Hayes, William R. Ming, Jr., Constance Baker Motley, James M. Nabrit, Jr., Charles S. Scott, Frank D. Reeves, Harold R. Boulware* and *Oliver W. Hill* for appellants in Nos. 1, 2 and 4 and respondents in No. 10; *George M. Johnson* for appellants in Nos. 1, 2 and 4; and *Loren Miller* for appellants in Nos. 2 and 4. *Arthur D. Shores* and *A. T. Walden* were on the Statement as to Jurisdiction and a brief opposing a Motion to Dismiss or Affirm in No. 2.

Paul E. Wilson, Assistant Attorney General of Kansas, argued the cause for appellees in No. 1 on the original argument and on the reargument. With him on the briefs was *Harold R. Fatzer,* Attorney General.

John W. Davis argued the cause for appellees in No. 2 on the original argument and for appellees in Nos. 2 and 4 on the reargument. With him on the briefs in No. 2 were *T. C. Callison,* Attorney General of South Carolina, *Robert McC. Figg, Jr., S. E. Rogers, William R. Meagher* and *Taggart Whipple.*

J. Lindsay Almond, Jr., Attorney General of Virginia, and *T. Justin Moore* argued the cause for appellees in No. 4 on the original argument and for appellees in Nos. 2 and 4 on the reargument. On the briefs in No. 4 were *J. Lindsay Almond, Jr.,* Attorney General and *Henry T. Wickham,* Special Assistant Attorney General, for the State of Virginia and *T. Justin Moore, Archibald G. Robertson, John W. Riely* and *T. Justin Moore, Jr.,* for the Prince Edward County School Authorities, appellees.

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†Together with No. 2, *Briggs et al. v. Elliott et al.,* on appeal from the United States District Court for the Eastern District of South Carolina, argued December 9–10, 1952, reargued December 7–8, 1953; No. 4, *Davis et al. v. County School Board of Prince Edward County, Virginia, et al.,* on appeal from the United States District Court for the Eastern District of Virginia, argued December 10, 1952, reargued December 7–8, 1953; and No. 10, *Gebhart et al. v. Belton et al.,* on certiorari to the Supreme Court of Delaware, argued December 11, 1952, reargued December 9, 1953.

H. Albert Young, Attorney General of Delaware, argued the cause for petitioners in No. 10 on the original argument and on the reargument. With him on the briefs was *Louis J. Finger*, Special Deputy Attorney General.

By special leave of Court, *Assistant Attorney General Rankin* argued the cause for the United States on the reargument, as *amicus curiae*, urging reversal in Nos. 1, 2 and 4 and affirmance in No. 10. With him on the brief were *Attorney General Brownell*, *Philip Elman*, *Leon Ulman*, *William J. Lamont* and *M. Magdalena Schoch*. *James P. McGranery*, then Attorney General, and *Philip Elman* filed a brief for the United States on the original argument, as *amicus curiae*, urging reversal in Nos. 1, 2 and 4 and affirmance in No. 10.

Briefs of *amici curiae* supporting appellants in No. 1 were filed by *Shad Polier*, *Will Maslow* and *Joseph B. Robison* for the American Jewish Congress; by *Edwin J. Lukas*, *Arnold Forster*, *Arthur Garfield Hays*, *Frank E. Karelsen*, *Leonard Haas*, *Saburo Kido* and *Theodore Leskes* for the American Civil Liberties Union et al.; and by *John Ligtenberg* and *Selma M. Borchardt* for the American Federation of Teachers. Briefs of *amici curiae* supporting appellants in No. 1 and respondents in No. 10 were filed by *Arthur J. Goldberg* and *Thomas E. Harris* for the Congress of Industrial Organizations and by *Phineas Indritz* for the American Veterans Committee, Inc.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.[1]

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[1] In the Kansas case, *Brown* v. *Board of Education*, the plaintiffs are Negro children of elementary school age residing in Topeka. They brought this action in the United States District Court for the District of Kansas to enjoin enforcement of a Kansas statute which permits, but does not require, cities of more than 15,000 population to maintain separate school facilities for Negro and white students. Kan. Gen. Stat. § 72–1724 (1949). Pursuant to that authority, the Topeka Board of Education elected to establish segregated elementary schools. Other public schools in the community, however, are operated on a nonsegregated basis. The three-judge District Court, convened under 28 U.S.C. §§ 2281 and 2284, found that segregation in public education has a detrimental effect upon Negro children, but denied relief on the ground that the Negro and white schools were substantially equal with respect to buildings, transportation, curricula, and educational qualifications of teachers. 98 F. Supp. 797. The case is here on direct appeal under 28 U.S.C. § 1253.

In the South Carolina case, *Briggs* v. *Elliott*, the plaintiffs are Negro children of both elementary and high school age residing in Clarendon County. They brought this action in the United States District Court for the Eastern District of South Carolina to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. S.C. Const., Art. XI, § 7; S.C. Code § 5377 (1942). The three-judge District Court, convened under 28 U.S.C. §§ 2281 and 2284, denied the requested relief. The court found that the Negro schools were inferior to the white schools and ordered the defendants to begin immediately to equalize the facilities. But the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. 98 F. Supp. 529. This Court vacated the District Court's judgment and remanded the case for the purpose of obtaining the court's views on a report filed by the defendants concerning the progress made in the equalization program. 342 U.S. 350. On remand, the District Court found that the substantial equality had been achieved except for buildings and that the defendants were proceeding to rectify this inequality as well. 103 F. Supp. 920. The case is again here on direct appeal under 28 U.S.C. § 1253.

In the Virginia case, *Davis* v. *County School Board*, the plaintiffs are Negro children of high school age residing in Prince Edward County. They brought this action in the United States District Court for the Eastern District of Virginia to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Va. Const., § 140; Va. Code § 22–221 (1950). The three-judge District Court, convened under 28 U.S.C. §§ 2281 and 2284, denied the requested relief. The court found the Negro school inferior in physical plant, curricula, and transportation, and ordered the defendants forthwith to provide substantially equal curricula and transportation and to "proceed with all reasonable diligence and dispatch to remove" the inequality in physical plant. But, as in the South Carolina case, the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in *Plessy* v. *Ferguson*, 163 U.S. 537. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction.[2] Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.[3]

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public edu-

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equalization program. 103 F. Supp. 337. The case is here on direct appeal under 28 U.S.C. § 1253.

In the Delaware case, *Gebhart* v. *Belton*, the plaintiffs are Negro children of both elementary and high school age residing in New Castle County. They brought this action in the Delaware Court of Chancery to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Del. Const., Art. X, § 2; Del. Rev. Code § 2631 (1935). The Chancellor gave judgment for the plaintiffs and ordered their immediate admission to schools previously attended only by white children, on the ground that the Negro schools were inferior with respect to teacher training, pupil-teacher ratio, extracurricular activities, physical plant, and time and distance involved in travel. 87 A. 2d 862. The Chancellor also found that segregation itself results in an inferior education for Negro children (see note 10, *infra*), but did not rest his decision on that ground. *Id.*, at 865. The Chancellor's decree was affirmed by the Supreme Court of Delaware, which intimated, however, that the defendants might be able to obtain a modification of the decree after equalization of the Negro and white schools had been accomplished. 91 A. 2d 137, 152. The defendants, contending only that the Delaware courts had erred in ordering the immediate admission of the Negro plaintiffs to the white schools, applied to this Court for certiorari. The writ was granted, 344 U.S. 891. The plaintiffs, who were successful below, did not submit a cross-petition.

[2] 344 U.S. 1, 141, 891.

[3] 345 U.S. 972. The Attorney General of the United States participated both Terms as *amicus curiae*.

cation at that time.[4] In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race.[5] The doctrine of "separate but equal" did not make its appearance in this Court until 1896 in the case of *Plessy* v. *Ferguson*, *supra*, involving not education but transportation.[6] American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education.[7] In *Cumming* v. *County Board of Education*, 175 U. S. 528, and *Gong Lum* v. *Rice*, 275 U. S. 78, the validity of the doctrine itself was not challenged.[8] In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. *Missouri ex rel. Gaines* v. *Canada*, 305 U. S 337; *Sipuel* v. *Oklahoma*, 332 U. S. 631; *Sweatt* v. *Painter*, 339 U.S. 629; *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637. In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt* v. *Painter*, *supra*, the Court expressly reserved decision on the question whether *Plessy* v. *Ferguson* should be held inapplicable to public education.

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[4] For a general study of the development of public education prior to the Amendment, see Butts and Cremin, A History of Education in American Culture (1953), Pts. I, II; Cubberley, Public Education in the United States (1934 ed.), cc. II–XII. School practices current at the time of the adoption of the Fourteenth Amendment are described in Butts and Cremin, *supra*, at 269–275; Cubberley, *supra*, at 288–339, 408–431; Knight, Public Education in the South (1922), cc. VIII, IX. See also H. Ex. Doc. No. 315, 41st Cong., 2d Sess. (1871). Although the demand for free public schools followed substantially the same pattern in both the North and the South, the development in the South did not begin to gain momentum until about 1850, some twenty years after that in the North. The reasons for the somewhat slower development in the South (*e.g.*, the rural character of the South and the different regional attitudes toward state assistance) are well explained in Cubberley, *supra*, at 408–423. In the country as a whole, but particularly in the South, the War virtually stopped all progress in public education. *Id.*, at 427–428. The low status of Negro education in all sections of the country, both before and immediately after the War, is described in Beale, A History of Freedom of Teaching in American Schools (1941), 112–132, 175–195. Compulsory school attendance laws were not generally adopted until after the ratification of the Fourteenth Amendment, and it was not until 1918 that such laws were in force in all the states. Cubberley, *supra*, at 563–565.

[5] *Slaughter-House Cases*, 16 Wall. 36, 67–72 (1873); *Strauder* v. *West Virginia*, 100 U.S. 303, 307–308 (1880):

> "It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."

See also *Virginia* v. *Rives*, 100 U.S. 313, 318 (1880); *Ex parte Virginia*, 100 U.S. 339, 344–345 (1880).

[6] The doctrine apparently originated in *Roberts* v. *City of Boston*, 59 Mass. 198, 206 (1850), upholding school segregation against attack as being violative of a state constitutional guarantee of equality. Segregation in Boston public schools was eliminated in 1855. Mass. Acts 1855, c. 256. But elsewhere in the North segregation in public education has persisted in some communities until recent years. It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern.

[7] See also *Berea College* v. *Kentucky*, 211 U.S. 45 (1908).

In the instant cases, that question is directly presented. Here, unlike *Sweatt* v. *Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors.[9] Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy* v. *Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

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[8] In the *Cumming* case, Negro taxpayers sought an injunction requiring the defendant school board to discontinue the operation of a high school for white children until the board resumed operation of a high school for Negro children. Similarly, in the *Gong Lum* case, the plaintiff, a child of Chinese descent, contended only that state authorities had misapplied the doctrine by classifying him with Negro children and requiring him to attend a Negro school.

[9] In the Kansas case, the court below found substantial equality as to all such factors. 98 F. Supp. 797, 798. In the South Carolina case, the court below found that the defendants were proceeding "promptly and in good faith to comply with the court's decree." 103 F. Supp. 920, 921. In the Virginia case, the court below noted that the equalization program was already "afoot and progressing" (103 F. Supp. 337, 341); since then, we have been advised, in the Virginia Attorney General's brief on reargument, that the program has now been completed. In the Delaware case, the court below similarly noted that the state's equalization program was well under way. 91 A. 2d 137, 149.

In *Sweatt* v. *Painter*, *supra*, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin* v. *Oklahoma State Regents*, *supra*, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ". . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."[10]

Whatever may have been the extent of psychological knowledge at the time of *Plessy* v. *Ferguson*, this finding is amply supported by modern authority.[11] Any language in *Plessy* v. *Ferguson* contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.[12]

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protecciton of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term.[13] The Attorney General of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as *amici curiae* upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.[14]

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[10] A similar finding was made in the Delaware case: I conclude from the testimony that in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarily situated." 87 A.2d 862, 865.

[11] K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J. Psychol. 259 (1948); Chein, What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (MacIver, ed., 1949), 44–48; Frazier, The Negro in the United States (1949), 674–681. And see generally Myrdal, An American Dilemma (1944).

[12] See *Bolling* v. *Sharpe*, *post*, p. 497, concerning the Due Process Clause of the Fifth Amendment.

It is so ordered.

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[13] "4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"(*a*) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

"(*b*) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

"5. On the assumption on which questions 4(*a*) and (*b*) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(*b*),

"(*a*) should this Court formulate detailed decrees in these cases;

"(*b*) if so, what specific issues should the decrees reach;

"(*c*) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

"(*d*) Should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

[14] See Rule 42, Revised Rules of this Court (effective July 1, 1954).

BOLLING ET AL. v. SHARPE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 8. Argued December 10–11, 1952.—Reargued December 8–9, 1953.—
Decided May 17, 1954.

George E. C. Hayes and *James M. Nabrit, Jr.* argued the cause for petitioners on the original argument and on the reargument. With them on the briefs were *George M. Johnson* and *Herbert O. Reid, Jr. Charles W. Quick* was also on the brief on the reargument.

Milton D. Korman argued the cause for respondents on the original argument and on the reargument. With him on the briefs were *Vernon E. West, Chester H. Gray* and *Lyman J. Umstead*.

By special leave of Court, *Assistant Attorney General Rankin* argued the cause on the reargument for the United States, as *amicus curiae*, urging reversal. With him on the brief were *Attorney General Brownell, Philip Elman, Leon Ulman, William J. Lamont* and *M. Magdelena Schoch. James P. McGranery*, then Attorney General, and *Philip Elman* filed a brief on the original argument for the United States, as *amicus curiae*, urging reversal.

Briefs of *amici curiae* supporting petitioners were filed by *S. Walter Shine, Sanford H. Bolz* and *Samuel B. Groner* for the American Council on Human Rights et al.: by *John Ligtenberg* and *Selma M. Borchardt* for the American Federation of Teachers; and by *Phineas Indritz* for the American Veterans Committee, Inc.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case challenges the validity of segregation in the public schools of the District of Columbia. The petitioners, minors of the Negro race, allege that such segregation deprives them of due process of law under the Fifth Amendment. They were refused admission to a public school attended by white children solely because of their race. They sought the aid of the District Court for the District of Columbia in obtaining admission. That court dismissed their complaint. The Court granted a writ of certiorari before judgment in the Court of Appeals because of the importance of the constitutional question presented. 344 U.S. 873.

We have this day held that the Equal Protection Clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools.[1] The legal problem in the District of Columbia is somewhat different, however. The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.[2]

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[1] *Brown* v. *Board of Education, ante*, p. 483.

Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.[3] As long ago as 1896, this Court declared the principle "that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race."[4] And in *Buchanan* v. *Warley*, 245 U.S. 60, the Court held that a statute which limited the right of a property owner to convey his property to a person of another race was, as an unreasonable discrimination, a denial of due process of law.

Although the Court has not assumed to define "liberty" with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.

In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.[5] We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.

For the reasons set out in *Brown* v. *Board of Education*, this case will be restored to the docket for reargument on Questions 4 and 5 previously propounded by the Court 345 U.S. 872.

It is so ordered.

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[2] *Detroit Bank* v. *United States*, 317 U.S. 329; *Currin* v. *Wallace*, 306 U.S. 1, 13-14; *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 585.

[3] *Korematsu* v. *United States*, 323 U.S. 214, 216; *Hirabayashi* v. *United States*, 320 U.S. 81, 100.

[4] *Gibson* v. *Mississippi*, 162 U.S. 565, 591. Cf. *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192, 198–199.

[5] Cf. *Hurd* v. *Hodge*, 334 U.S. 2.

BROWN ET AL. v. BOARD OF EDUCATION OF TOPEKA ET AL.

NO. 1 APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.*

Reargued on the question of relief April 11–14, 1955.—Opinion and judgments announced May 31, 1955.

1. Racial discrimination in public education is unconstitutional, 347 U.S. 483, 497, and all provisions of federal, state or local law requiring or permitting such discrimination must yield to this principle. P. 298.
2. The judgments below (except that in the Delaware case) are reversed and the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit the parties to these cases to public schools on a racially nondiscriminatory basis with all deliberate speed. P. 301.

(a) School authorities have the primary responsibility for elucidating, assessing and solving the varied local school problems which may require solution in fully implementing the governing constitutional principles. P. 299.

(b) Courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. P. 299.

(c) Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. P. 299.

(d) In fashioning and effectuating the decrees, the courts will be guided by equitable principles—characterized by a practical flexibility in shaping remedies and a facility for adjusting and reconciling public and private needs. P. 300.

(e) At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. P. 300.

(f) Courts of equity may properly take into account the public interest in the elimination in a systematic and effective manner of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles enunciated in 347 U.S. 483, 497; but the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them. P. 300.

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* Together with No. 2, *Briggs et al.* v. *Elliott et al.*, on appeal from the United States District Court for the Eastern District of South Carolina; No. 3, *Davis et al.* v. *County School Board of Prince Edward County, Virginia, et al.*, on appeal from the United States District Court for the Eastern District of Virginia; No. 4, *Bolling et al.* v. *Sharpe et al.*, on certiorari to the United States Court of Appeals for the District of Columbia Circuit; and No. 5, *Gebhart et al.* v. *Belton et al.*, on certiorari to the Supreme Court of Delaware.

(g) While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with the ruling of this Court. P. 300.

(h) Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. P. 300.

(i) The burden rests on the defendants to establish that additional time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. P. 300.

(j) The courts may consider problems related to administration, arising from the physical condiiton of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. Pp. 300-301.

(k) The courts will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. P. 301.

(l) During the period of transition, the courts will retain jurisdiction of these cases. P. 301.

3. The judgment in the Delaware case, ordering the immediate admission of the plaintiffs to schools previously attended only by white children, is affirmed on the basis of the principles stated by this Court in its opinion, 347 U.S. 483; but the case is remanded to the Supreme Court of Delaware for such further proceedings as that Court may deem necessary in the light of this opinion. P. 301.

98 F. Supp. 797, 103 F. Supp. 920, 103 F. Supp. 337 and judgment in No. 4, reversed and remanded.

91 A. 2d 137, affirmed and remanded.

Robert L. Carter argued the cause for appellants in No. 1. *Spottswood W. Robinson, III*, argued the causes for appellants in Nos. 2 and 3. *George E. C. Hayes* and *James M. Nabrit, Jr.* argued the cause for petitioners in No. 4. *Louis L. Redding* argued the cause for respondents in No. 5. *Thurgood Marshall* argued the causes for appellants in Nos. 1, 2 and 3, petitioners in No. 4 and respondents in No. 5.

On the briefs were *Harold Boulware*, *Robert L. Carter*, *Jack Greenberg*, *Oliver W. Hill*, *Thurgood Marshall*, *Louis L. Redding*, *Spottswood W. Robinson, III*, *Charles S. Scott*, *William T. Coleman, Jr.*, *Charles T. Duncan*, *George E. C. Hayes*, *Loren Miller*, *William R. Ming, Jr.*, *Constance Baker Motley*, *James M. Nabrit, Jr.*, *Louis H. Pollak* and *Frank D. Reeves* for appellants in Nos. 1, 2 and 3 and respondents in No. 6; and *George E. C. Hayes*, *James M. Nabrit, Jr.*, *George M. Johnson*, *Charles W. Quick*, *Herbert O. Reid*, *Thurgood Marshall* and *Robert L. Carter* for petitioners in No. 4.

Harold R. Fatzer, Attorney General of Kansas, argued the cause for appellees in No. 1. With him on the brief was *Paul E. Wilson*, Assistant Attorney General. *Peter F. Caldwell* filed a brief for the Board of Education of Topeka, Kansas, appellee.

S. E. Rogers and *Robert McC. Figg, Jr.* argued the cause and filed a brief for appellees in No. 2.

J. Lindsay Almond, Jr., Attorney General of Virginia, and *Archibald G. Roberston* argued the cause for appellees in No. 3. With them on the brief were *Henry T. Wickham*, Special Assistant to the Attorney General, *T. Justin Moore*, *John W. Riely* and *T. Justin Moore, Jr.*

Milton D. Korman argued the cause for respondents in No. 4. With him on the brief were *Vernon E. West*, *Chester H. Gray* and *Lyman J. Umstead*.

Joseph Donald Craven, Attorney General of Delaware, argued the cause for petitioners in No. 5. On the brief were *H. Albert Young*, then Attorney General, *Clarence W. Taylor*, Deputy Attorney General, and *Andrew D. Christie*, Special Deputy to the Attorney General.

In response to the Court's invitation, 347 U.S. 483, 495–496, *Solicitor General Sobeloff* participated in the oral argument for the United States. With him on the brief were *Attorney General Brownell*, *Assistant Attorney General Rankin*, *Philip Elman*, *Ralph S. Spritzer* and *Alan S. Rosenthal*.

By invitation of the Court, 347 U.S. 483, 496, the following State officials presented their views orally as *amici curiae*: *Thomas J. Gentry*, Attorney General of Arkansas, with whom on the brief were *James L. Sloan*, Assistant Attorney General, and *Richard B. McCulloch*, Special Assistant Attorney General. *Richard W. Ervin*, Attorney General of Florida, and *Ralph E. Odum*, Assistant Attorney General, both of whom were also on a brief. *C. Ferdinand Sybert*, Attorney General of Maryland, with whom on the brief were *Edward D. E. Rollins*, then Attorney General, *W. Giles Parker*, Assistant Attorney General, and *James H. Norris, Jr.*, Special Assistant Attorney General. *I. Beverly Lake*, Assistant Attorney General of North Carolina, with whom on the brief were *Harry McMullan*, Attorney General, and *T. Wade Bruton*, *Ralph Moody* and *Claude L. Love*, Assistant Attorneys General. *Mac Q. Williamson*, Attorney General of Oklahoma, who also filed a brief. *John Ben Shepperd*, Attorney General of Texas, and *Burnell Waldrep*, Assistant Attorney General, with whom on the brief were *Billy E. Lee*, *J. A. Amis, Jr.*, *L. P. Lollar*, *J. Fred Jones*, *John Davenport*, *John Reeves* and *Will Davis*.

Phineas Indritz filed a brief for the American Veterans Committee, Inc., as *amicus curiae*.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

These cases were decided on May 17, 1954. The opinions of that date,[1] declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference.

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[1] 347 U.S. 483; 347 U.S. 497.

All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle. There remains for consideration the manner in which relief is to be accorded.

Because these cases arose under different local conditions and their disposition will involve a variety of local problems, we requested further argument on the question of relief.[2] In view of the nationwide importance of the decision, we invited the Attorney General of the United States and the Attorneys General of all states requiring or permitting racial discrimination in public education to present their views on that question. The parties, the United States, and the States of Florida, North Carolina, Arkansas, Oklahoma, Maryland, and Texas filed briefs and participated in the oral argument.

These presentations were informative and helpful to the Court in its consideration of the complexities arising from the transition to a system of public education freed of racial discrimination. The presentations also demonstrated that substantial steps to eliminate racial discrimination in public schools have already been taken, not only in some of the communities in which these cases arose, but in some of the states appearing as *amici curiae*, and in other states as well. Substantial progress has been made in the District of Columbia and in the communities in Kansas and Delaware involved in this litigation. The defendants in the cases coming to us from South Carolina and Virginia are awaiting the decision of this Court concerning relief.

Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.[3]

In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies[4] and by a facility for adjusting and reconciling public and private needs.[5] These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

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[2] Further argument was requested on the following questions, 347 U.S. 483, 495–496, n. 13, previously propounded by the Court:

"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"(*a*) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

"(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

"5. On the assumption on which questions 4(*a*) and (*b*) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(*b*),

"(*a*) should this Court formulate detailed decrees in these cases;

"(*b*) if so, what specific issues should the decrees reach;

"(*c*) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

"(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

[3] The cases coming to us from Kansas, South Carolina, and Virginia were originally hard by three-judge District Courts convened under 28 U.S.C. §§ 2281 and 2284. These cases will accordingly be remanded to those three-judge courts. See *Briggs v. Elliott*, 342 U.S. 350.

[4] See ***Alexander* v. *Hillman***, 296 U.S. 222, 239.

[5] See ***Hecht Co.* v. *Bowles***, 321, U.S. 321, 329–330.

While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases.

The judgments below, except that in the Delaware case, are accordingly reversed and the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases. The judgment in the Delaware case—ordering the immediate admission of the plaintiffs to schools previously attended only by white children—is affirmed on the basis of the principles stated in our May 17, 1954, opinion, but the case is remanded to the Supreme Court of Delaware for such further proceedings as that Court may deem necessary in light of this opinion.

It is so ordered.

In the United States Court of Appeals for the Fifth Circuit

No. 23345

UNITED STATES OF AMERICA AND LINDA STOUT, BY HER FATHER AND NEXT FRIEND, BLEVIN STOUT, APPELLANTS,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL., APPELLEES.

No. 23331

UNITED STATES OF AMERICA, APPELLANT,

v.

THE BOARD OF EDUCATION OF THE CITY OF FAIRFIELD, ET AL., APPELLEES.

No. 23335

UNITED STATES OF AMERICA, APPELLANT,

v.

THE BOARD OF EDUCATION OF THE CITY OF BESSEMER, ET AL., APPELLEES.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

No. 23274

UNITED STATES OF AMERICA, APPELLANT,

v.

CADDO PARISH SCHOOL BOARD, ET AL., APPELLEES.

No. 23365

United States of America, appellant,

v.

The Bossier Parish School Board, et al., appellees.

No. 23173

Margaret M. Johnson et al., appellants,

v.

Jackson Parish School Board et al., appellees.

No. 23192

Yvornia Decarol Banks et al., appellants,

v.

Claiborne Parish School Board et al., appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

(December 29, 1966.)

Before WISDOM and THORNBERRY, Circuit Judges,
and COX,* District Judge.

WISDOM, Circuit Judge: Once again the Court is called upon to review school desegregation plans to determine whether the plans meet constitutional standards. The distinctive feature of these cases, consolidated on appeal, is that they require us to reexamine school desegregation standards in the light of the Civil Rights Act of 1964 and the Guidelines of the United States Office of Education, Department of Health, Education, and Welfare (HEW).

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* William Harold Cox, U. S. District Judge for the Southern District of Mississippi, sitting by designation.

When the United States Supreme Court in 1954 decided *Brown v. Board of Education*[1] the members of the High School Class of 1966 had not entered the first grade. *Brown I* held that separate schools for Negro children were "inherently unequal".[2] Negro children, said the Court, have the "personal and present" right to equal educational opportunities with white children in a racially nondiscriminatory public school system. For all but a handful of Negro members of the High School Class of '66 this right has been "of such stuff as dreams are made on".[3]

"The *Brown* case is misread and misapplied when it is construed simply to confer upon Negro pupils the right to be considered for admission to a white school."[4] The United States Constitution, as construed in *Brown*, requires public school systems to integrate students, faculties, facilities, and activities.[5] If *Brown I* left any doubt as to the

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[1] Brown v. Board of Education, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L. Ed. 873 (*Brown I*). See Brown v. Board of Education, 1955, 349 U.S. 294, 75 S.Ct. 293 99 L. Ed. 1083 (*Brown II*).

[2] 347 U.S. at 495.

[3] Shakespeare, The Tempest IV. The cases consolidated for appeal involve Alabama and Louisiana public schools. In Alabama, as of December 1965, there were 1250 Negro pupils, out of a statewide total of 295,848, actually enrolled in schools with 559,123 white students, 0.43% of the eligible Negro enrollment. In Louisiana there were 2187 Negro children, out of a total of 318,651, enrolled in school with 483,941 white children, 0.69% of the total eligible. Southern Education Reporting Service, Statistical Summary of Segregation-Desegregation in the Southern and Border Area from 1954 to the present, 15th Rev. p. 2, Dec. 1965. See Appendix B, Rate of Change and Status of Desegregation. In each of the seven cases before this Court, no start was made toward desegregation of the schools until 1965, eleven years after *Brown*. In all these cases, the start was a consequence of a court order obtained only after vigorous opposition by school officials.

[4] Braxton v. Board of Public Instruction of Duval County, S.D.Fla. 1962, 7 Race Rel. L. Rep. 675 *aff'd*, 5 Cir. 1964, 326 F.2d 616, *cert. den'd* 377 U.S. 924 (1964). Senator Humphrey cited this case in explaining Section 604 of The Civil Rights Act of 1964. See Section IV D of this opinion.

[5] The mystique that has developed over the supposed difference between "desegregation" and "integration" originated in Briggs v. Elliott, E.D.S.C. 1955, 132 F. Supp. 776: "The Constitution . . . does not require integration. It merely forbids segregation". 132 F. Supp. at 777. This dictum is a product of the narrow view that Fourteenth Amendment rights are only individual rights; that therefore Negro school children individually must exhaust their administrative remedies and will not be allowed to bring class action suits to desegregate a school system. See Section IIIA of this opinion.

The Supreme Court did not use their "desegregation" or "integration" in *Brown*. But the Court did quote with approval a statement of the district court in which "integrated" was used as we use it here. For ten years after *Brown* the Court carefully refrained from using "integration" or "integrated". Then in 1964 in Griffin v. County School Board of Prince Edward County, 375 U.S. 391, 84 S.Ct. 400, 11 L.Ed.2d 409, the Court noted that "the Board of Supervisors decided not to levy taxes or appropriate funds for *integrated* public schools", i.e. schools under a desegregation order. There is not one Supreme Court decision which can be fairly construed to show that the Court distinguished "degregation" from "integration", in terms or by even the most gossamer implication.

Counsel for the Alabama defendants assert that "desegregation" and "integration" are terms of art. They struggle valiantly to define these words:

> By "desegregation" we mean the duty imposed by *Brown* upon schools which previously compelled segregation to take affirmative steps to eliminate such *compulsory segregation* so as to *allow* the *admission* of students to schools on a nonracial admission basis.
> By "integration" we mean the actual placing of or attendance by Negro students in schools with whites.

They can do so only by narrowing the definitions to the point of inadequacy. Manifestly, the duty to desegregate schools extends beyond the mere "admission" of Negro students on a non-racial basis. As for "integration", manifestly a desegregation plan must include some arrangement for the attendance of Negroes in formerly white schools.

In this opinion we use the words "integration" and "desegregation" interchangeably. That is the way they are used in the vernacular. That is the way they are defined in Webster's Third New International Dictionary: " 'integrate' to 'desegregate' ". The Civil Rights Commission follows this usage: for eample, "The Office of Education . . . standards . . . should . . . ensure that free choice plans are adequate to disestablish dual, racially segregated school systems . . . to achieve substantial integration in such systems." U.S. Comm. Survey of School Desegregation 1965–66, p. 54.

The Eighth Circuit used "integration" interchangeably with "desegregation" in Smith v. Board of Education of Morrilton, 8 Cir. 1966, 365 F.2d 770. So did the Third Circuit in Evans v. Ennis, 3 Cir. 1960, 281 F.2d 385. See also Brown v. County School Board of Frederick County, Va., W.D.Va. 1965, 245 F.Supp. 549. The courts in Dowell v. School Board of Oklahoma City Public Schools, W.D.Okla. 1965, 244 F. Supp. 971 and Dove v. Parham, 8 Cir. 1960, 282 F.2d 256 (and the Civil Rights Commission), speak of a school board's duty to "*disestablish* segregation". This term accurately "implies that existing racial imbalance is a consequence of past segregation policies, and, because of this, school boards *have an affirmative duty to remedy racial imbalance*". Note, Discrimination in the Hiring affirmative duty of states to furnish a fully integrated education to Negroes as a class. *Brown II* resolved that doubt. A state with a dual attendance system, one for whites and one for Negroes, must "effectuate a transition to a [single] racially nondiscriminatory system."[6] The two *Brown* decisions established equalization of educational opportunities as a high priority goal for all of the states and compelled seventeen states, which by law had segregated public schools, to take affirmative action to reorganize their schools into a unitary, nonracial system.

The only school desegregation plan that meets constitutional standards is one that works. By helping public schools to meet that test, by assisting the courts in their independent evaluation of school desegregation plans, and by accelerating the progress but simplifying the process of desegregation the HEW Guidelines offer new hope to Negro school children long denied their constitutional rights. A national effort, bringing together Congress, the executive, and the judiciary may be able to make meaningful the right of Negro children to equal educational opportunities. The courts acting alone have failed.

We hold, again, in determining whether school desegregation plans meet the standards of *Brown* and other decisions of the Supreme Court,[7] that courts in this circuit should give "great weight" to HEW Guidelines.[8] Such deference is consistent with the exercise of traditional judicial powers and functions. HEW Guidelines are based on decisions of this and other courts, and formulated to stay within the scope of the Civil Rights Act of 1964, are prepared in detail by experts in education and school administration, and are intended by Congress and the executive to be part of a coordinated national program. The Guidelines present the best system available for uniform application, and the best aid to the courts in evaluating the validity of a school desegregation plan and the progress made under that plan.

HEW regulations provide that schools applying for financial assistance must comply with certain requirements. However, the requirements for elementary or secondary schools "shall be deemed to be satisfied if such school or school system is subject to a final order of a court of the United States for the desegregation of such school

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and Assignment of Teachers in Public School Systems, 64 Mich. L. Rev. 692, 698 n.44 (1966). (Emphasis added.)

We use the terms "integration" and "desegregation" of formerly segregated public schools to mean the conversion of a de jure segregated dual system to a unitary, nonracial (nondiscriminatory) system—lock, stock, and barrel; students, faculty, staff, facilities, programs, and activities. The proper governmental objective of the conversion is to offer educational opportunities on equal terms to all.

As we see it, the law imposes an absolute duty to desegregate, that is, disestablish segregation. And an absolute duty to integrate, in the sense that a disproportionate concentration of Negroes in certain schools cannot be ignored; racial mixing of students is a high priority educational goal. The law does not require a maximum of racial mixing or striking a racial balance accurately reflecting the racial composition of the community or the school population. It does not require that each and every child shall attend a racially balanced school. This, we take it, is the sense in which the Civil Rights Commission used the phrase "substantial-integration".

As long as school boards understand the objective of desegregation and the necessity for complete disestablishment of segregation by converting the dual system to a nonracial unitary system, the nomenclature is unimportant. The criterion for determining the validity of a provision in a desegregation plan is whether it is reasonably related to the objective. We emphasize, therefore, the governmental objective and the specifics of the conversion process, rather than the imagery evoked by the pejorative "integration". Decision-making in this important area of the law cannot be made to turn upon a quibble devised over ten years ago by a court that misread *Brown*, misapplied the class action doctrine in the school desegregation cases, and did not foresee the development of the law of equal opportunities.

[6] Brown v. Board of Education, 1955, 349 U.S. 294, 301.

[7] Especially Cooper v. Aaron, 1958, 358 U.S. 1, 78 S.Ct. 1399, 3 L.Ed.2d 3; Bradley v. School Board of the City of Richmond, 1965, 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187; Rogers v. Paul, 1965, 382 U.S. 198, 86 S.Ct. 358, 15 L.Ed.2d 265.

[8] Singleton v. Jackson Municipal Seperate School District, 5 Cir. 1965, 348 F.2d 729 (*Singleton I*).

or school system . . ."[9] This regulation causes our decisions to have a two-fold impact on school desegregation. Our decisions determine not only (1) the standards schools must comply with under *Brown* but also (2) the standards these schools must comply with to qualify for federal financial assistance. Schools automatically qualify for federal aid whenever a final court order desegregating the school has been entered in the litigation and the school authorities agree to comply with the order. Because of the second consequence of our decisions and because of our duty to cooperate with Congress and with the executive in enforcing Congressional objectives, strong policy considerations support our holding that the standards of court-supervised desegregation should not be lower than the standards of HEW-supervised desegregation. The Guidelines, of course, cannot bind the courts; we are not abdicating any judicial responsibilities.[10] But we hold that HEW's standards are substantially the same as this Court's standards. They are required by the Constitution and, as we construe them, are within the scope of the Civil Rights Act of 1964. In evaluating desegregation plans, district courts should make few exceptions to the Guidelines and should carefully tailor those so as not to defeat the policies of HEW or the holding of this Court.

Case by case over the last twelve years, courts have increased their understanding of the desegregation process.[11] Less and less have courts accepted the question-begging distinction between "desegregation" and "integration" as a sanctuary for school boards fleeing from their constitutional duty to establish an integrated, non-racial school system.[12] With the benefit of this experience, the Court has restudied the School Segregation Cases. We have reexamined the nature of the Negro's right to equal educational opportunities and the extent of the correlative affirmative duty of the state to furnish equal educational opportunities. We have taken a close look at the background and objectives of the Civil Rights Act of 1964.[13]

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We approach decision-making here with humility. Many intelligent men of good will who have dedicated their lives to public education are deeply concerned for fear that a doctrinaire approach to desegregating schools may lower educational standards or even destroy public schools in some areas. These educators and school administrators, especially in communities where total segregation has been the way of life from cradle to coffin, may fail to understand all of the legal implications of *Brown*, but they understand the grim realities of the problems that complicate their task.

The Court is aware of the gravity of their problems. (1) Some determined opponents of desegregation would scuttle public education rather than send their children to schools with Negro children. These men flee to the suburbs, reinforcing urban neighborhood school patterns. (2) Private schools, aided by state grants, have mushroomed in some states in this circuit.[14] The flight of white children to these new schools and to established private and parochial schools promotes resegregation. (3) Many white teachers prefer not to teach in Negro schools. They are tempted to seek employment at white schools or to retire. (4) Many Negro children, for various reasons, prefer to finish school where they started. (5) The gap between white and Negro scholastic achievements causes all sorts of difficulties. There is no consolation in the fact that the gap depends on the socio-economic status of Negroes at least as much as it depends on inferior Negro schools.

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[9] 45 C.F.R. §80.4(c) (1964).

[10] In *Singleton I*, to avoid any such inference, we said: "The judiciary has of course functions and duties distinct from those of the executive department . . . Absent legal questions, the United States Office of Education is better qualified. . . ." 348 F. 2d at 731.

[11] "The rule has become: the later the start, the shorter the time allowed for transition." Lockett v. Board of Education of Muscogee County, 5 Cir. 1965, 342 F.2d 225, 228.

[12] See Section III A and footnote 5.

[13] The Court asked counsel in these cosolidated cases and in five other cases for briefs on the following questions:

(a) To what extent, consistent with judicial prerogatives and obligations, statutory and constitutional, is it permissible and desirable for a federal court (trial or appellate) to give weight to or to rely on H.E.W. guidelines and policies in cases before the court?

(b) If permissible and desirable, what practical means and methods do you suggest that federal courts (trial and appellate) should follow in making H.E.W. guidelines and policies judicially effective?

No court can have a confident solution for a legal problem so closely interwoven with political, social, and moral threads as the problem of establishing fair, workable standards for undoing de jure school segregation in the South. The Civil Rights Act of 1964 and the HEW Guidelines are belated but invaluable helps in arriving at a neutral, principled decision consistent with the dimensions of the problem, traditional judicial functions, and the United States Constitution. We grasp the nettle.

I.

"No army is stronger than an idea whose time has come."[15] Ten years after *Brown*, came the Civil Rights Act of 1964.[16] Congress decided that the time had come for a sweeping civil rights advance, including national legislation to speed up desegregation of public schools and to put teeth into enforcement of desegregation.[17] Titles IV and VI together constitute the congressional alternative to court-supervised desegregation. These sections of the law mobilize in aid of desegregating the United States Office of Education and the Nation's purse.

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[14] Alabama provides tuition grants of $185 a year and Louisiana $360 a year to students attending private schools. "Only Florida and Texas report no obvious cases of private schools formed to avoid desegregation in public schools." Up to the school year 1965–66, Louisiana had "some 11,000 pupils already receiving state tuition grants to attend private schools." This number will be significantly increased as a result of new private schools in Plaquemines Parish. Leeson, Private Schools Continue to Increase in the South, Southern Education Report, November 1966, p. 23. In Louisiana, students attending parochial schools do not receive tuition grants.

[15] In a press meeting May 19, 1964, to discuss the Civil Rights bill, Senator Everett Dirksen so paraphrased, "On résiste à l'invasion des armées; on ne résiste pas à l'invasion des idées." Victor Hugo, Historie d'un crime: Conclusion: La Chute, Ch. 10 (1877). Senator Dirksen then said, "Let editors rave at will and let states fulminate at will, but the time has come, and it can't be stopped." Cong. Quarterly Service, Revolution in Civil Rights 63 (1965).

[16] H.R. 7152, Pub. L. 88–352, 78 Stat. 243 approved July 2, 1964.

[17] "[I]n the last decade it has become increasingly clear that progress has been too slow and that national legislation is required to meet a national need which becomes ever more obvious. That need is evidenced, on the one hand, by a growing impatience by the victims of discrimination with its continuance and, on the other hand, by a growing recognition on the part of all of our people of the incompatibility of such discrimination with our ideas and the principles to which this country is dedicated. A number of provisions of the Constitution of the United States clearly supply the means 'to secure these rights,' and H.R. 7152, as amended, resting upon this authority, is designed as a step toward eradicating significant areas of discrimination on a nationwide basis. It is general in application and national in scope." House Judiciary Committee Report No. 914, to Accompany H.R. 7152, 2 U.S. Code Congressional and Administrative News, 88th Cong. 2nd Sess. 1964, 2933. "The transition from all-Negro to integrated schools is at best a difficult problem of adjustment for teachers and students alike. . . .We have tried to point out that the progress in school desegregation so well commenced in the period 1954–57 has been grinding to a halt. The trend observed in 1957–59 toward desegregation by court order rather than by voluntary action has continued. It is not healthy nor right in this country to require the local residents of a community to carry the sole burden and face alone the hazards of commencing costly litigation to compel school desegregation. After all, it is the responsibility of the Federal Government to protect constitutional rights. . . ." Additional Views on H.R. 7152 of Hon. William M. McCulloch, Hon. John V. Lindsay, Hon. William T. Cahill, Hon. Garner E. Shriver, Hon. Clark MacGregor, Hon. Charles McC. Mathias, Hon. James E. Bromwell." Ibid., 2487.

A. Title IV authorizes the Office of Education to give technical and financial assistance to local school systems in the process of desegregation.[18] Title VI requires all federal agencies administering any grant-in-aid program to see to it that there is no racial discrimination by any school or other recipient of federal financial aid.[19] School boards cannot, however, by giving up federal aid, avoid the policy that produced this limitation on federal aid to schools: Title IV authorizes the Attorney General to sue, in the name of the United States, to desegregate a public school or school system.[20] More clearly and effectively than either of the other two coordinate branches of Government, Congress speaks as the Voice of the Nation. *The national policy is plain: formerly de jure segregated public school systems based on dual attendance zones must shift to unitary, nonracial systems—with or without federal funds.*

The Chief Executive acted promptly to carry into effect the Chief Legislature's mandate. President Lyndon B. Johnson signed the bill into law July 2, 1964, only a few hours after Congress had finally approved it. In the signing ceremony broadcast to the Nation, the President said: "We believe all men are entitled to the blessings of liberty, yet millions are being deprived of those blessings—not because of their own failures, but because of the color of their skins. . . . [It] cannot continue."[21] At the request of President Johnson, Vice President Hubert H. Humphrey submitted a report to the President "On the Coordination of Civil Rights Activities in the Federal Government" recommending the creation of a Council on Equal Opportunity. The report concludes that "the very breadth of the Federal Government's effort, involving a multiplicity of programs" necessary to carry out the 1964 Act had created a "problem of coordination." The President approved the recommendation that instead of creating a new agency there be a general coordination of effort.[22] Later, the President noted that the federal departmeents and agencies had "adopted uniform and consistent regulations implementing Title VI . . . [in] a coordinated program of enforcement." He directed the Attorney General to "coordinate" the various federal programs in the adoption of "consistent and uniform policies, practices and procedures with respect to the enforcement of Title VI. . . ."[23]

In April 1965 Congress for the first time in its history adopted a law providing general federal aid—a billion dollars a year—for elementary and secondary schools.[24] It is a fair assumption that Congress would not have taken this step had Title VI not established the principle that schools receiving federal assistance must meet uniform national standards for desegregation.[25]

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[18] 78 Stat. 246-49, 42 U.S.C. § 2000c (1964).

[19] 78 Stat. 252-53, 42 U.S.C. § 2000d (1964). Section 601 states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Section 602 states: "Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of Section 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. . . ."

[20] 78 Stat. 246-49, 42 U.S.C. § 2000c (1964). In addition, Title IX authorizes the Attorney General to intervene in private suits where persons have alleged denial of equal protection of the laws under the 14th Amendment where he certifies that the case is of "general public importance." 78 Stat. 266, Title IX § 902, 42 U.S.C. § 2000 h-2 (1964).

[21] N.Y. Times, July 3, 1964, p. 1.

[22] Exeecutive Order 11197, Feb. 9, 1965, 30 F.R. 1721.

[23] Executive Order No. 11247, Sept. 28, 1965, 30 F. R. 12327.

[24] The Elementary and Secondary Education Act of 1965, 79 Stat. 27.

To make Title VI effective, the Department of Health, Education, and Welfare (HEW) adopted the regulation, "Non-discrimination in Federally Assisted Programs."[26] This regulation directs the Commissioner of Education to approve applications for financial assistance to public schools only if the school or school system agrees to comply with a court order, if any, outstanding against it, or submits a desegregation plan satisfactory to the Commissioner.[27]

To make the regulation effective, by assisting the Office of Education in determining whether a school qualifies for federal financial aid and by informing school boards of HEW requirements, HEW formulated certain standards or guidelines. In April 1965, nearly a year after the Act was signed, HEW published its first *Guidelines*, "General Statement of Policies under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools."[28] These *Guidelines* fixed the fall of 1967 as the target date for total desegregation of all grades. In March 1966 HEW issued "*Revised Guidelines*" to correct most of the major flaws revealed in the first year of operation under Title VI.[29]

B. The HEW Guidelines raise the question: To what extent should a court, in determining whether to approve a school desegregation plan, give weight to the HEW Guidelines? We adhere to the answer this Court gave in four earlier cases. The HEW Guidelines are "minimum standards", representing for the most part standards the Supreme Court and this Court established *before the Guidelines were promulgated.*[30] Again we hold, "we attach great weight" to the *Guidelines*. *Singleton v. Jackson Municipal Separate School District*, 5 Cir. 1965, 348 F.2d 729 (*Singleton I*). "We put these standards to work. . . . [Plans] should be modeled after the Commissioner of Education's requirements. . . . [Exceptions to the guidelines should be] confined to those rare cases presenting justiciable, not operational, questions. . . . The applicable standard is essentially the HEW formulae." *Price v. Denison Independent School District*, 5 Cir. 1965, 348 F. 2d 1010. "We consider it to be in the best interest of all concerned that School Boards meet the minimum standards of the Office of Education. . . . In certain school districts and in certain respects, HEW standards may be too low to meet the requirements established by the Supreme Court and by this Court. . . . [But we also] consider it important to make clear that . . . we do not abdicate our judicial responsibility for determining whether a school desegregation plan violates federally guaranteed rights." *Singleton v. Jackson Municipal Separate School District*, 5 Cir. 1966, 355 F.2d 815 (*Singleton II*). In *Davis v. Board of School Commissioners of Mobile County*, 5 Cir. 1966, 364 F.2d 896, the most recent school case before this Court, we approved *Singleton I* and *II* and *Price v. Denison* and ordered certain changes in the school plan in conformity with the HEW Guidelines.

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[25] "The Elementary and Secondary Education Act of 1965 greatly increased the amount of federal money available for public schools, and did so in accordance with a formula that pumps the lion's share of the money to low-income areas such as the Deep South. Consequently, Title VI of the Civil Rights Act of 1964 has become the main instrument for accelerating and completing the desegregation of Southern public schools." The New Republic, April 9, 1966 (Professor Alexander M. Bickel).

[26] 45 C.F.R. Part 80, Dec. 4, 1964, 64 F.R. 12539.

[27] "Every application for Federal financial assistance to carry out a program to which this part applies . . . shall, as a condition to its approval . . ., contain or be accompanied by an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part. . . ." 45 C.F.R. § 80.4(a) (1964).

[28] U.S. Departmet of Health, Education and Welfare, Office of Education, General Statement of Policies under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools, April, 1965. It is quoted in full in Price v. Denison Independent School District, 5 Cir. 1965, 348 F.2d at 1010.

[29] Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964, March, 1966.

[30] In Davis v. Board of School Commissioners of Mobile County, 5 Cir. 1966, 364 F.2d 896 Judge Tuttle, for the Court, noted that "for more than a year, it has been apparent to all concerned that the requirements of Singleton and Denison were the minimum standards to apply."

Courts in other circuits are in substantial agreement with this Court. In *Kemp v. Beasley*, 8 Cir. 1965, 352 F. 2d 14, 18–19, the Court said: "The Court agrees that these [HEW] standards must be *heavily relied upon* . . . . [T]he courts should endeavor to model their standards after those promulgated by the executive. They are not bound, however, and when circumstances dictate, the courts may require something more, less or different from the H.E.W. guidelines." (Emphasis added.) Concurring, Judge Larson observed: "However, that 'something different' should rarely, if ever be less than what is contemplated by the H.E.W. standards." 352 F.2d at 23. *Smith v. Board of Education of Morrilton*, 8 Cir. 1966, 365 F.2d 770 reaffirms that the Guidelines "are entitled to serious judicial deference".

Although the Court of Appeals for the Fourth Circuit has not yet considered the effect of the HEW standards, district courts in that circuit have relied on the guidelines. See *Kier v. County School Board of Augusta County*, W.D.Va. 1966, 249 F. Supp. 239; *Wright v. County School Board of Greenville County*, E.D.Va. 1966, 252 F. Supp. 378; *Miller v. Clarendon County School District No. 2*, D.S.C., Civil Action No. 8752, April 21, 1966. In *Miller*, one of the most recent of these cases, the court said:

> The orderly progress of desegregation is best served if school systems desegregating under court order are required to meet the minimum standards promulgated for systems that desegregate voluntarily. Without directing absolute adherence to the "Revised Standards" guidelines at this juncture, this court will welcome their inclusion in any new, amended, or substitute plan which may be adopted and submitted.

In this circuit, the school problem arises from state action. This Court has not had to deal with nonracially motivated de facto segregation, that is, racial imbalance resulting fortuitously in a school system based on a single neighborhood school serving all white and Negro children in a certain attendance area or neighborhood. For this circuit, the HEW Guidelines offer, for the first time, the prospect that the transition from a de jure segregated dual system to a unitary integrated system may be carried out effectively, promptly, and in an orderly manner. See Appendix B, Rate of Change and Status of Desegregation.

II.

We read Title VI as a congressional mandate for change—change in pace and method of enforcing desegregation. The 1964 Act does not disavow court-supervised desegregation. On the contrary, Congress recognized that to the courts belongs the last word in any case or controversy.[31] But Congress was dissatisfied with the slow progress inherent in the judicial adversary process.[32] Congress therefore fashioned a new method of enforcement to be administered not on a case by case basis as in the courts but, generally, by federal agencies operating on a national scale and having a special competence in their respective fields. Congress looked to these agencies to shoulder the additional enforcement burdens resulting from the shift to high gear in school desegregation.

A. Congress was well aware that it was time for a change. In the decade following *Brown*, court-supervised desegregation made qualitative progress: Responsible Southern leaders accepted desegregation as a settled constitutional principle.[33] Qualitatively, the results were meagre. The statistics speak eloquently. See Appendix B, Rate of Change and Status of Desegregation. In 1965 the public school districts in the consolidated cases now before this Court had a school population of 155,782 school children, 59,361 of whom were Negro. Yet under the existing court-approved desegregation plans, only 110 Negro children in these districts, .019 per cent of the school population, attend former "white" schools.[34] In 1965 there was no faculty desegregation in any of these school districts; indeed, none of the 30,500 Negro teachers in Alabama, Louisiana, and Mississippi served with any of the 65,400 white teachers in those states.[35] In the 1963–64 school year,

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[31] Title IV, § 407, 42 U.S.C. § 2000 (c) authorizing the Attorney General to bring suit, on receipt of a written complaint, would seem to imply this conclusion. Section 409 preserves the right of individual citizens "to sue for or obtain relief" against discrimination in public education. HEW Regulations provide: "In any case in which a final order of a court of the United States for the desegregation of such school or school system is entered after submission of such a plan, such a plan shall be revised to conform to such final order, including any future modification of such order." 45 C.F.R. § 80.4(c) (1964).

[32] See footnote 17.

[33] "The Federal courts have been responsible for great qualitative advances in civil rights: the lack has been in quantitative implementation—in enabling the individual to avail himself of these great decisions." Bernhard and Natalie, Between Rights and Remedies, 53 Georgetown L. Jour. 915, 916 (1965[I]t is the consensus of the judges on the firing line, so to speak, that one phase in the administration of the law—the establishment phase, characterized by permissive tokenism, by a sort of minimal judicial holding of the line while the political process did, as it must, the main job of establishing—this phase has been closed out." Bickel, The Decade of School Desegregation, 64 Colum. L. Rev. 193, 209 (1964). The changes of the past decade have disappointed the most optimistic hopes, but they have been dramatically sweeping nonetheless. Gellhozn, A Decade of Desegregation—Retrospect and Prospect, 9 Utah L. Rev. 3 (1964). "What makes one uneasy, of course, is the truly awesome magnitude of what has yet to be done." Marshall, *The Courts*, in Center for the Study of Democratic Institutions, The Maze of Modern Government 36 (1964), quoted in Pollak, Ten Years After the Decision, 24 Fed. Bar Jour. 123 (1964). On the first decade of desegregation, see generally, Sarratt, The Ordeal of Desegregation (1966); Legal Aspects of the Civil Rights Movement (D. B. King ed. 1965).

[34] (See table below.)

	Total enrollment		Negroes admitted to formerly white schools
	White	Negro	
Bessemer, Ala.	2,920	5,284	13
Fairfield, Ala.	1,779	2,159	31
Jefferson County, Ala.	45,000	18,000	24
Caddo Parish, La.	30,680	24,467	1
Bossier Parish, La.	11,100	4,400	31
Jackson Parish, La.	2,548	1,609	5
Claiborne Parish, La.	2,394	3,442	5

Note: Affidavit of St. John Barrett, attorney, Department of Justice, attached to motion to consolidate and expedite appeals.

[35] U.S. Dept. of Health, Education, and Welfare, Office of Education Release, Table 3, September 27, 1965. In the 11 states of the Confederacy there are 1800 Negro teachers, 1.8 per cent of all the Negro teachers in Southern schools, assigned to schools with biracial faculties. By contrast, in the border states (Delaware, Kentucky, Maryland, Missouri, Oklahoma, and West Virginia, 51 per cent of the Negro teachers now teach white students. Ibid.

the elevent states of the Confederacy had 1.17 per cent of their Negro students in schools with white students.[36] In 1964–65, undoubtedly because of the effect of the 1964 Act, the percentage doubled, reaching 2.25. For the 1965–66 school year, this time because HEW Guidelines, the percentage reached 6.01 per cent. In 1965–66 the entire region encompassing the Southern *and border states* had 10.9 per cent of their Negro children in school with white children; 1,555 biracial school districts out of 3,031 in the Southern and border states were still fully segregated; 3,101,043 Negro children in the region attended all-Negro schools. Despite the impetus of the 1964 Act, the states of Alabama, Louisiana, and Mississippi, still had less than one per cent of their Negro enrollment attending schools with white students.[37]

The dead hand of the old past and the closed fist of the recent past account for some of the slow progress. There are other reasons—as obvious to Congress as to courts. (1) Local loyalties compelled school officials and elected officials to make a public record of their unwillingness to act. But even school authorities willing to act have moved slowly because of uncertainty as to the scope of their duty to act affirmatively. This is attributable to (a) a misplaced reliance on the *Briggs* dictum that the Constitution "does not require integration",[38] (b) a misunderstanding of the *Brown II* mandate, desegregate with "due deliberate speed",[39] and (c) a mistaken notion that transfers under the Pupil Placement Laws satisfy desegregation requirements.[40] (2) Case by case development of the law is a poor sort of medium for reasonably prompt and uniform desegregation. There are natural limits to effective legal action. Courts cannot give advisory opinions, and the disciplined exercise of the judicial function properly makes courts reluctant to move forward in an area of the law bordering the periphery of the judicial domain. (3) The contempt power is ill-suited to serve as the chief means of enforcing desegregation. Judges naturally shrink from using it against citizens willing to accept the thankless, painful responsibility of serving on a school board.[41] (4) School desegregation plans are often woefully inadequate: they rarely provide necessary detailed instructions and specific answers to administrative problems.[42] And most judges do not have sufficient competence—they are not educators or school administrators—to know the right questions, much less the right answers. (5) But one reason more than any other has held back desegregation of public schools on a large scale. This has been the lack, until 1964, of effective congressional statutory recognition of school desegregation as the law of the land.[43]

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[36] Southern Education Reporting Service, Statistical Summary, Dec. 1965, cited in U.S. Comm. on Civil Rights, Survey of School Desegregation in the Southern and Border States 1965–66, p. 1.

[37] *Ibid.*; see footnote 3; Appendix B, Rate of Change and Status of Desegregation.

[38] See Section III A of this opinion.

[39] In Davis v. Board of School Commissioners of Mobile County, 5 Cir. 1966, 364 F.2d 896, 898, Judge Tuttle, for the Court, said: "This is the fourth appearance of this case before this court. This present appeal, coming as it does from an order of the trial court entered nearly eighteen months ago, on March 31, 1965, points up, among other things, the utter impracticability of a continued exercise by the courts of the responsibility for supervising the manner in which segregated school systems break out of the policy of complete segregation into gradual steps of compliance and toward complete compliance with the constitutional requirements of Brown v. Board of Education, 347 U.S. 483. One of the reasons for the impracticability of this method of overseeing the transitional stages of operations of the school boards involved is that, under the Supreme Court's 'deliberate speed' provisions, it has been the duty of the appellate courts to interpret and reinterpret this language as time has grown apace, it now being the twelfth school year since the Supreme Court's decision."

[40] "The pupil assignment acts have been the principal obstacle to desegregation in the South." U.S. Comm. on Civil Rights, Civil Rights U.S.A.—Public Schools, Southern States 15, 1962. See Note, The Federal Courts and Integration of Southern Schools: Troubled Status of the Pupil Placement Acts, 62 Colum. L. Rev. 1448, 1471–73 (1962); Bush v. Orleans Parish School Board, 5 Cir. 1962, 308 F.2d 491. Such laws allow carefully screened Negro children, *on their application*, to transfer to white schools from the segregated schools to which the Negroes were initially unconstitutionally assigned. Often, even after six to eight years of no desegregation, these transfers were limited to a grade a year. When this law first came before us we held it to be unconstitutional. Bush v. Orleans Parish School Board, E.D.La. 1956, 138 F. Supp. 337, *aff'd* 242 F.2d 156, *cert. den'd* 354 U.S. 921 (1957). Later, in a narrowly focused opinion, we held that the Alabama version was constitutional *on its face*. Shuttlesworth v. Birmingham Board of Education, N.D.Ala. 1958, 162 F.Supp. 372, aff'd per curiam, 358 U.S. 101 (1958). As long ago as 1959 and 1960 this Court disapproved of such acts as a reasonable start toward full compliance. Gibson v. Board of Public Instruction of Dade County, 272 F.2d 763; Mannings v. Board of Public Instruction of Hillsborough County, 277 F.2d 370. See also Bush v. Orleans Parish School Board, 5 Cir. 1961, 308 F.2d 491; Evers v. Jackson Municipal Separate School District, 5 Cir. 1964, 328 F.2d 408 "[T]he entire public knows that in fact [the Louisiana law] . . . is being used to maintain segregation. . . . It is not a plan for desegregation at all." Bush v. Orleans Parish School Board, 308 F.2d at 499–500.

"Considerable progress has been made . . . Nevertheless, in the last decade it has become increasingly clear that progress has been too slow and that national legislation is required to meet a national need which becomes ever more obvious." [44] Title VI of the Civil Rights Act of 1964, therefore, was not only appropriate and proper legislation under the Thirteenth and Fourteenth Amendments; it was necesary to rescue school desegregation from the bog in which it had been trapped for ten years.[45]

The Civil Rights Commission, doubtless better able than any other authority to understand the significance of the Civil Rights Act of 1964, had this to say about Title VI:

> "This statute heralded a new era in school desegregation . . . Most significantly . . . Federal power was to be brought to bear in a manner which promised speedier and more substantial desegregation than had been achieved through the voluntary efforts of

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[41] Bush v. Orleans Parish School Board is an example. The board was plagued by bundles of Louisiana statutes aimed at defeating desegregation. There were five extra sessions of the Louisiana legislature in 1960. After the School Board had for three years failed to comply with an order to submit a plan, the district judge wrote one himself. The trial judge simply said: "All children [entering New Orleans public schools . . . may attend either the formerly all white public schools nearest their homes, or the formerly all Negro public schools nearest their homes, at their option. B. Children may be transferred from one school to another, provided such transfers are not based on race". 204 F.Supp. 568, 571–72.

[42] For example, the order of the able district judge in *Bush*. See footnote 41. Judge Bohanon underscored this point in Dowell v. School Board of Oklahoma City Public Schools, W.D.Okla. 1965, 244 F. Supp. 971, 976: "The plan submitted to this Court . . . is not a plan, but a statement of policy. School desegregation is a difficult and complicated matter, and, as the record shows, cannot be accomplished by a statement of policy. ¶ Desegregation of public schools in a system as large as Oklahoma City requires a definite and positive plan providing definable and ascertainable goals to be achieved within a definite time according to a prepared procedure and with responsibilities clearly designated."

[43] The Civil Rights Act of 1964 had its direct genesis in President Kennedy's message to Congress of June 19, 1963, urging passage of an omnibus civil rights law. He noted: "In the continued absence of congressional action, too many state and local officials as well as businessmen will remain unwilling to accord these rights to all citizens. Some local courts and local merchants may well claim to be uncertain of the law, while those merchants who do recognize the justice of the Negro's request (and I believe these constitute the great majority of merchants, North and South) will be fearful of being the first to move, in the face of official customer, employee, or competitive pressures, Negroes, consequently, can be expected to continue increasingly to see the vindication of these rights through organized direct action, with all its potentially explosive consequences, such as we have seen in Birmingham, in Philadelphia, in Jackson, in Boston, in Cambridge, Md., and in many other parts of the country. ¶ In short, the result of continued Federal legislative inaction will be continued, if not increased, racial strife—causing the leadership on both sides to pass from the hands of reasonable and responsible men to the purveyors of hate and violence, endangering the domestic tranquillity, retarding our nation's economic and social progress and weakening the respect with which the rest of the world regards us. No American, I feel sure, would prefer this course of tension, disorder, and division—and the great majority of our citizens simply cannot accept it." H. Doc. 124, 88th Cong. 1st Sess. June 20, 1963. Rep. Emanuel Celler, Chairman of the House Judiciary Committee, introduced H.R. 7152 embodying the President's proposals. The same day Senator Mike Mansfield introduced a similar bill, S. 1731. H.R. 7152-S. 1731, as amended, became the Civil Rights Act of 1964.

[44] H. Rep. No. 914, 88th Cong., 1st Sess.

[45] "It was the Congressional purpose, in Title VI of the Civil Rights Act of 1964, to remove school desegregation efforts from the courts, where they had been bogged down for more than a decade. Unless the power of the Federal purse is more effectively utilized, resistance to national policy will continue and, in fact, will be reinforced." Report of the White House Conference "To Fulfill These Rights", June 1–2, 1966, p. 63.

school boards and district-by-district litigation. . . . During fiscal year 1964, $176,546,992 was distributed to State and local school agencies in the 17 Southern and border States. The passage of the Elementary and Secondary Education Act of 1965 added an additional appropriation of $589,946,135 for allocation to the 17 Southern and border States for fiscal year 1966. With funds of such magnitude at stake, most school systems would be placed at a serious disadvantage by termination of Federal assistance."[46]

B. The congressional mandate, as embodied in the Act and as carried out in the HEW Guidelines, does not conflict with the proper exercise of the judicial function or with the doctrine of separation of powers. It does however profoundly affect constructive use of the judicial function within the lawful scope of sound judicial discretion. When Congress declares national policy, the duty the two other coordinate branches owe to the Nation requires that, within the law, the judiciary and the executive respect and carry out that policy. Here the Chief Executive acted promptly to bring about uniform standards for desegregation. The judicial branch too should cooperate with Congress and the executive in making administrative agencies effective instruments for supervising and enforcing desegregation of public schools. Justice Harlan F. Stone expressed this well:

> "Legislatures create administrative agencies with the desire and expectation that they will perform efficiently the tasks committed to them. That, at least, is one of the contemplated social advantages to be weighed in resolving doubtful construction. Its aim is so obvious as to make unavoidable the conclusion that the function which courts are called upon to perform, in carrying into operation such administrative schemes, is constructive, not destructive, to make administrative agencies, whenever reasonably possible, effective instruments for law enforcement, and not to destroy them.[47]

In an analogous situation involving enforcement of the Fair Labor Standards Act, the Supreme Court has said, "Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons." *Skidmore* v. *Swift & Co.*, 1944, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124. In an appeal from the district court's denial of an injunction to enforce labor standards under the Act this Court has pointed out:

> ". . . this proceeding is only superfically related to a suit in equity for an injunction to protect interests jeopardized in a private controversy. The public interest is jeopardized here. The injunctive processes are a means of effecting general compliance with national policy as expressed by Congress, a public policy

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[46] Rep. U.S. Comm. on Civil Rights, Survey of School Desegregation in the Southern and Border States—1965–66, p. 2.

[47] Stone, The Common Law in the United States, 50 Harv. L. Rev. 1, 18 (1936). In a similar vein, writing for the Court, Justice Stone has said: ". . . In construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through co-ordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim." United States v. Morgan, 1939, 307 U. S. 183, 191, 59 S. Ct. 795, 799, 83 L.Ed. 1211.

> judges too must carry out—actuated by the spirit of the law and not begrudgingly as if it were a newly imposed fiat of a presidium.... Implicit in the defendants' non-compliance, as we read the briefs and the record, is a certain underlying, not unnatural, Actonian distaste for national legislation affecting local activities. But the Fair Labor Standards Law has been on the books for twenty-three years. The Act establishes a policy for all of the country, and for the courts as well as for the agency required to administer the law. Mitchell v. Pidcock, 5 Cir. 1962, 299 F. 2d 281, 287, 288.

C. We must therefore cooperate with Congress and the Executive in enforcing Title VI. The problem is: Are the HEW Guidelines within the scope of the congressional and executive policies embodied in the Civil Rights Act of 1964. We hold that they are.

The Guidelines do not purport to be a rule or regulation or order. They constitute a statement of policy under section 80.4(c) of the HEW Regulations issued after the President approved the regulations December 3, 1964. HEW is under no statutory compulsion to issue such statements. It is, however, of manifest advantage to school boards throughout the country and to the general public to know the criteria the Commissioner uses in determining whether a school meets the requirements for eligibility to receive financial assistance.

The Guidelines have the vices of all administrative policies established unilaterally without a hearing. Because of these vices the courts, as the school boards point out, have set limits on administrative regulations, rulings, policies, and practices: an agency construction of a statute cannot make the law: it must conform to the law and be reasonable. To some extent the administrative weight of the declarations depends on the place of such declarations in the hierarchy of agency pronouncements extending from regulations down to general counsel memoranda and inter-office decisions. See *Manhattan General Electric Company v. Commissioner*, 1936, 297 U.S. 129, 56 S. Ct. 397, 80 L. Ed. 528; *United States v. Bennett*, 5 Cir. 1951, 186 F.2d 407; *United States v. Mississippi Chemical Corporation*, 5 Cir. 1964, 326 F.2d 569; *Chattanooga Auto Club v. Commissioner*, 6 Cir. 1950, 182 F.2d. 551.

These and similar decisions are not inconsistent with the court's giving great weight to the HEW's policy statements on enforcement of Title VI. In *Skidmore v. Swift & Co.*, 323 U.S. 134, an action was commenced in a federal district court by employees of Swift & Co. to recover wages at the overtime rates prescribed by the Fair Labor Standards Act (52 Stat. 1060, et seq.) for certain services which they had performed. At issue was whether these services constituted "employment" within the meaning of section 7(a) of that act. The district court and this Court, on appeal, decided this issue against the plaintiffs. The Supreme Court reversed. After acknowledging (323 U.S. at 137) that the statute had granted no rule-making power to the Wage and Hour Administrator with respect to the issue at hand ("[i]nstead, it put this responsibility on the courts"), the Court referred to an "Interpretative Bulletin" issued by the Administrator containing his interpretation of the statutory phrase in question. The Supreme Court said:

> "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants

> may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[48]

The Supreme Court found that the lower courts had misunderstood their function vis-a-vis the Interpretative Bulletin and remanded the case. See also, *United States v. American Trucking Association*, 1940, 310 U. S. 543, 549; *Goldberg v. Serras*, 1 Cir. 1961, 294 F.2d 841, 847.

The national importance of the HEW Guidelines, the evident thoroughness with which these standards were prepared and formulated by educational authorities, the similarity of the HEW standards to the standards this Court and the Supreme Court have established, and the manifest effort of the Office of Education to be faithful to the congressional objectives of the 1964 Civil Rights Act entitle the HEW Guidelines to greater weight by the courts than run-of-the-mine policy statements low in the hierarchy of administrative declarations.

Courts therefore should cooperate with the congressional-executive policy in favor of desegregation and against aiding segregated schools.

D. Because our approval of a plan establishes eligibility for federal aid, our standards should not be lower than those of HEW. Unless judicial standards are substantially in accord with the Guidelines, school boards previously resistant to desegregation will resort to the courts to avoid complying with the minimum standards HEW promulgates for schools that desegregate voluntarily. As we said in *Singleton I*:

> "If in some district courts judicial guides for approval of a school desegregation plan are more acceptable to the community or subtsantially less burdensome than H.E.W. guides, school boards may turn to the federal courts as a means of circumvening the H.E.W. requirements for financial aid. Instead of a uniform policy relatively easy to administer, both the courts and the Office of Education would have to struggle with individual school systems on ad hoc basis. If judicial standards are lower, recalcitrant school boards in effect will receive a premium for recalcitrance; the more the intransigence, the bigger the bonus." 348 F.2d at 731.

In *Kemp v. Beasley*, 8 Cir. 1965, 352 F.2d 14, the Court concluded:

> "[HEW] standards must be heavily relied upon. . . . Therefore, to the end of promoting a degree of uniformity and discouraging reluctant school boards from reaping a benefit from their reluctance the courts should endeavor to model their standards after those promulgated by the executive." 352 F.2d at 18, 19.

Concurring, Judge Larson, speaking from his experience as a district judge, pointed out that school boards which do not act voluntarily retard the desegregation process to the disadvantage of the individual's constitutional rights: "Judicial criteria", therefore, "should probably be more stringent" than HEW Guidelines:

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[48] The Supreme Court also stated in *Skidmore*, 323 U.S. at 139-40: "The rulings of this Administrator are not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact. They are not, of course, conclusive, even in the cases with which they directly deal, much less in those to which they apply only by analogy. They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do. But the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. They do determine the policy which will guide applications for enforcement by injunction on behalf of the Government. *Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be a variance only where justified by very good reasons.*" (Emphasis added.)

> "A school board which fails to act voluntarily forces Negro students to solicit aid from the court. This not only shifts the burden of initiating desegregation, but inevitably means delay in taking the first step. As Judge Gibson observes, we are not here concerned with regulating the flow of Federal funds. Our task is to safeguard basic constitutional rights. Thus, our standards should be directed toward full, complete, and final realization of those rights." 352 F.2d at 23.

The announcement in HEW regulations that the Commissioner would accept a final school desegregation order as proof of the school's eligibility for federal aid prompted a number of schools to seek refuge in the federal courts. Many of these had not moved an inch toward desegregation.[49] In Louisiana alone twenty school boards obtained quick decrees providing for desegregation according to plans greatly at variance with the Guidelines.[50]

We shall not permit the courts to be used to destroy or dilute the effectiveness of the congressional policy expressed in Title VI. There is no bonus for footdragging.

E. The experience this Court has had in the last ten years argues strongly for uniform standards in court-supervised desegregation.

The first school case to reach this Court after *Brown v. Board of Education* was *Brown v. Rippey*, 5 Cir. 1956, 237 F.2d 796. Since then we have reviewed 41 other school cases, many more than once.[51] The district courts in this circuit have considered 128 school cases in the

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[49] The following statement appeared in the Shreveport Journal for July 1, 1965: "The local school boards prefer a court order over the voluntary plan because HEW regulations governing the voluntary plans or compliance agreements demand complete desegregation of the entire system, including students, faculty, staff, lunch workers, bus drivers, and administrators, whereas the court-ordered plans can be more or less negotiated with the judge." This was not news to the Court.

[50] We may also expect a number of school desegregation suits to be filed in Alabama. The legislature has enacted a statute declaring the Guidelines null and void in Alabama and prohibiting school officials signing any agreement to comply. The bill provides that any agreement or assurance of compliance with the guidelines already in effect "is null and void and shall have no binding effect." H.B. 446, approved September 2, 1966.

[51] The brief of the United States gives the following figures:

1. Case Load

	District Court	Court of Appeals	Supreme Court
Number of Cases	128	42	5
Number of Orders Entered	513	76	10

2. Frequency of Appeals to this Court

Number of Cases With One or More Appeals	42
Number of Cases With Two or More Appeals	21
Number of Cases With Three or More Appeals	8
Number of Cases With Four or More Appeals	4
Number of Cases With Five or More Appeals	2

In Bush v. Orleans Parish School Board the complaint was filed September 5, 1952. Bush's peregrinations through the courts are reported as follows: 138 F. Supp. 336 (3-judge 1956) motion for leave to file petition for mandamus denied, 351 U.S. 948 (1956); 138 F. Supp. 337 (1956), aff'd 242 F. 2d 156 (1957), cert. den'd, 354 U.S. 921 (1957); 252 F. 2d 253, cert. den'd 356 U.S. 969 (1958); 163 F. Supp. 701 (1958), aff'd, 268 F. 2d 78 (1959); 187 F. Supp. 42 (3-judge 1960), motion to stay den'd, 364 U.S. 803 (1960), aff'd 365 U.S. 569 (1961); 188 F. Supp. 916 (3-judge 1960), motion for stay denied, 364 U.S. 500 (1960), aff'd, 365 U.S. 569 (1961); 190 F. Supp. 861 (3-judge 1960), aff'd 366 U.S. 212 (1961); 191 F. Supp. 871 (3-judge 1961), aff'd 367 U.S. 908 (1961); 194 F. Supp. 182 (3-judge 1961), aff'd, 367 U.S. 907 (1961); 368 U.S. 11 (1961); 204 F. Supp. 568 (1962); 205 F. Supp. 893 (1962), aff'd in part and rev'd in part 308 F. 2d 491 (1962); 230 F. Supp. 509 (1963).

same period. Reviewing these cases imposes a taxing, time-consuming burden on the courts not reflected in statistics. An analysis of the cases shows a wide lack of uniformity in areas where there is no good reason for variations in the schedule and manner of desegregation.[52] In some cases there has been a substantial time-lag between this Court's opinions and their application by the district courts.[53] In certain cases—which we consider unnecessary to cite—there has even been a manifest variance between this Court's decision and a later district court decision. A number of district courts still mistakenly assume that transfers under Pupil Placement Laws—superimposed on unconstitutional initial assignment—satisfy the requirements of a desegregation plan. The lack of clear and uniform standards to govern school boards has tended to put a premium on delaying actions. In sum, the lack of uniform standards has retarded the development of local responsibility for the administration of schools without regard to race or color. What was true of an earlier Athens and an earlier Rome is true today: In Georgia, for example, there should not be one law for Athens and another law for Rome.

Before HEW published its Guidelines, this Court had already established guidelines for school desegregation: to encourage uniiformity at the district court level and to conserve judicial effort at both the district court and appellate levels. We did so by making detailed suggestions to the district courts. *Lockett v. Board of Education of Muscogee County*, 5 Cir. 1964, 342 F.2d 225; *Bivens v. Board of Education for Bibb County*, 5 Cir. 1965, 242 F.2d 229; *Armstrong v. Board of Education of Birmingham*, 5 Cir. 1964, 333 F.2d 47; *Davis v. Board of School Commissioners of Mobile County*, 5 Cir. 1964, 333 F.2d 53; *Stell v. Savannah-Chatham County Board of Education*, 5 Cir. 1964, 333 F.2d 55; *Gaines v. Dougherty County Board of Education*, 5 Cir. 1964, 334 F.2d 983. In other areas of the law involving recurrent problems of regional or national interest, this Court has also found guidelines advantageous. In *United States v. Ward*, 5 Cir. 1965, 347 F.2d 795, and *United States v. Palmer*, 5 Cir. 1966, 356 F.2d 951, suits to enjoin registrars of voters from discriminating against Negroes, we attached identical proposed decrees for the guidance of district courts.[54] See also *Scott v. Walker*, 5 Cir. 1966, 358 F.2d 561, one of a series of cases on the exclusion of Negroes from juries.

F. We summarize the Court's policy as one of encouraging the maximum legally permissible correlation between judicial standards for school desegregation and HEW Guidlines. This policy may be applied without federal courts' abdicating their proper judicial function. The policy complies with the Supreme Court's increasing emphasis on more speed and less deliberation in school desegregation.[35] It is consistent with the judiciary's duty to the Nation to cooperate with the two other coordinate branches of government in carrying out the national policy expressed in the Civil Rights Act of 1964.

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[52] Of the 90 court-approved freedom of choice plans in this circuit, 44 do not desegregate all grades by 1967; 78 fail to provide specific, non-racial criteria for denying choices; 79 fail to provide any start toward faculty desegregation; only 22 provide for transfers to take courses not otherwise available; only 4 include the *Singleton* transfer rule.

[53] See footnote 39.

[54] In *Ward* the Court said: "[G]ood administration suggests that the proposed decree be indicated by an Appendix, not because of any apprehension that the conscientious District Judge would not faithfully impose every condition so obviously implied, but rather because of factors bearing upon administration itself. It is not possible, or even desirable, of course to achieve absolute uniformity. But in this ever growing class of cases which have their genesis in unconstitutional lack of uniformity as between races, courts within this single circuit should achieve a relative uniformity without further delay." 349 F.2d at 805.

III.

The defendants contend that the Guidelines require integration, not just desegregation: that school boards have no affirmative duty to integrate. They say that in this respect the Guidelines are contrary to the provisions of the Civil Rights Act of 1964 and to constitutional intent expressed in the Act. *This argument rests on nothing that the United States Supreme Court held or said in Brown or in any other case*. It rests on two glosses on *Brown:* the opinions in *Briggs v. Elliott*, E.D.S.C. 1955, 132 F. Supp. 776 and *Bell v. School City of Gary*, N.D. Ind. 1963, 213 F. Supp. 819, aff'd. 7 Cir. 1963, 324 F.2d 209. *Briggs*, decided only six weeks after *Brown II*, is one of the earliest cases in this field of law. The portion of the opinion most quoted is pure dictum. *Briggs* did not paraphrase the law as the Supreme Court stated it is *Brown* or as the law must be stated today in the light of *Aaron v. Cooper*, *Rogers v. Paul* and *Bradley v. School Board*. These and other decisions compel states in this circuit to take affirmative action to reorganize their school systems by integrating the students, faculties, facilities, and activities. As for *Bell*, it is inapplicable to cases in this circuit, all of which involve formerly de jure segregated schools. Although the legislative history of the statute shows that the floor managers for the Act and other members of the Senate and House cited and quoted these two opinions they did so within the context of the problem of de facto segregation. A study of the Guidelines shows that the HEW standards are within the rationale of *Brown* and the congressional objectives of the Act.

A. *Briggs*, an action to desegregate the public schools in Clarendon County, South Carolina, was one of the school cases consolidated with *Brown v. Board of Education of Topeka, Kansas*. On remand, a distinguished court (Parker and Dobie, Circuit Judges, and Timmerman, District Judge) felt that it was important to "point out exactly what the Supreme Court has decided and what it has not decided." The Court said:

> "It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. . . . *The Constitution, in other words, does not require integration. It merely forbids segregation*." 132 F. Supp. at 777.

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[35] "There has been entirely too much deliberation and not enough speed in enforcing the constitutional rights which we held in Brown v. Board of Education had been denied Prince Edward County Negro children." Griffin v. County School Board of Prince Edward County, 1964, 377 U.S. 218, 229, 84 S. Ct. 1226, 12 L.Ed.2d 256, 264. See also Rogers v. Paul and Bradley v. School Board of the City of Richmond, 1965, 382 U.S. 103, 86 S. Ct. 224, 15 L.Ed.2d 187. "*Brown* never contemplated that the concept of 'deliberate speed' would countenance indefinite delay in elimination of racial barriers in schools. . . ." (Goldberg, J.) Watson v. City of Memphis, 1963, 373 U.S. 526, 530, 83 S. Ct. 1314, 1317, 10 L.Ed.2d 529, 534.

Ten years later Clarendon County schools were still totally segregated.[56]

This Court and other courts, gratuitously for the most part, have often paraphrased or quoted with approval the *Briggs* dictum.[57] It is not surprising, therefore, that *Briggs* prompted Pupil Placement Laws, the most effective technique for perpetuating school segregation. And it is not surprising that school officials—the *Briggs* dictum dinned into their ears for a decade—have not now faced up to faculty integration. However, as this Court's experience in handling school cases increased, the Court became aware of the frustrating effects of *Briggs*. In *Singleton I* we referred to the dictum as "inconsistent with Brown [II] and the later development of decisional and statutory law in the area of civil rights." 348 F.2d at 730 n.5. In *Singleton II* we called it an "oversimplified" construction of *Brown I*. We added: "The Constitution forbids unconstitutional state action in the form of segregated facilities, including segregated public schools. School authorities, therefore, are under the constitutional compulsion of furnishing a single, integrated school system." 355 F.2d at 369. Other federal courts have disapproved of the *Briggs* dictum.[58]

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[56] See Brunson v. Board of Trustees of School District No. 1, 4 Cir. 1962, 311 F.2d 107; Southern Education Reporting Service, Statistical Summary, Nov. 1964, p. 46.

[57] The Fifth Circuit cases are: Borders v. Rippy, 1957, 247 F.2d 268, 271; Boston v. Rippy, 1960, 285 F.2d 43, 48; Lockett v. Board of Education of Muscogee County, 5 Cir. 1965, 342 F.2d 225; Avery v. Wichita Falls Independent School District, 1956, 241 F.2d 230, 233; Stell v. Savannah-Chatham County Board of Education, 1964, 333 F.2d 55, 59; Evers v. Jackson, 1964, 328 F.2d 408; cf. Cohen v. Public Housing Administration, 1958, 257 F.2d 73 (public housing); City of Montgomery v. Gilmore, 1960, 277 F.2d 364 (public parks). For a list of cases in other circuits see footnotes 10 and 11 in Blocker v. Board of Education of Manhasset, E.D.N.Y. 1964, 226 F. Supp. 208, 220. In *Blocker* Judge Zavitt notes that "the construction draws continuing sustenance through a process in which each case relies upon a preceding one; it would appear that the ultimate and solitary source is this dictum in Briggs v. Elliott." 226 F. Supp. at 220.

In Borders v. Rippy, 5 Cir. 1957, 247 F.2d 268, the Court reversed the judgment of the district court dismissing the complaint and directed the entry of a judgment enjoining the defendants "from requiring segregation of the races in any school under their supervision". On remand, the district court entered an order enjoining the defendants "from requiring or *permitting* segregation of the races in any school under their supervision". On the second appeal, in Rippy v. Borders, 5 Cir. 1957, 250 F.2d 690, 692, the Court again reversed the district court, stating: "We have emphasized the words '*or permitting segregation of the races*' in the district court's order because that expression migh indicate a serious misconception of the applicable law and of the mandate of this Court. Our mandate (footnote 1, supra) had been carefully limited so as to direct the entry of a judgment restraining and enjoining the defendants '*from requiring segregation of the races* in any school under their supervision' (emphasis supplied). Likewise in our opinion, we had pointed out that is only *racially discriminatory* segregation in the public schools which is forbidden by the Constitution."

[58] In Kemp v. Beasley the Eighth Circuit remarked: "The dictum in *Briggs* has not been followed or adopted by this Circuit and is logically inconsistent with Brown." Blocker v. Board of Education of Manhasset, E.D.N.Y. 1964, 226 F. Supp. 208, makes a frontal attack on *Briggs*. In that case, which concerned segregation characterized as *de jure*, Judge Zavitt observed that even where the *Briggs* dictum has seemingly been adopted, "it appears to be in a state of diminishing force if not outright erosion", citing Dillard v. School Board of the City of Charlottesville, 4 Cir. 1962, 308 F.2d 920, *cert. denied*, 374 U.S. 827 (1963), and McCoy v. Greensboro City Board of Education, 4 Cir. 1960, 283 F.2d 667. The Third Circuit, reversing a district court's approval of a year-by-year plan, ignored *Briggs*: "if the plan as approved by the court below be not drastically modified, a large number of the Negro children of Delaware will be deprived of education *in integrated* schools, despite the fact that the *Supreme Court has unqualifiedly declared integration to be their constitutional right*." (Emphasis added.) Evans v. Ennis, 3 Cir. 1960, 281 F.2d 385, 389, *cert. den'd* 364 U.S. 933. In Evans v. Ennis, only three school districts were involved. Nevertheless, the court required the district judge to order the State Board of Education and the State Superintendent of Delaware to prepare 'a plan which will provide for the *integration* of all grades of the public school system of Delaware." "Eventually", Judge Biggs said, "a wholly integrated school system will be effected for Delaware: 'wholly integrated' in the sense that all school children whether white or Negro, . . . will attend schools without regard to race or color." Sometimes a court's action in regard to the school board's affirmative duty has spoken louder than *Briggs'* words. In Evans v. Buchanan D.C. Del. 1962, 207 F. Supp. 820, although the court cited *Briggs* and stated that the Fourteenth Amendment "does not contemplate compelling action; rather it is a prohibition preventing the States from applying their laws unequally", the court did compel the school boards to act. The Court found that the Negro school children who wished to attend integrated schools were attending an all-Negro school, with an all-Negro faculty, surrounded by white attendance area. On those bare facts, the Court found: "The . . . Board as promulgator of the plan and the State Board of Education as the party having

The *Briggs* dictum may be explained as a facet of the Fourth Circuit's now abandoned view that Fourteenth Amendment rights are exclusively individual rights and in school cases are to be asserted individually after each plaintiff has exhausted state administrative remedies.[59] The Court disallowed class suits because Negro students who had not asked for transfers to white schools had not individually exhausted their remedies and were therefore not similarly situated with the plaintiffs. Thus in *Carson v. Warlick*, 4 Cir. 1956, 238 F. 2d 724, Judge John Parker, for the Court, stated:

> "There is no question as to the right of these [Negro] school children. . . . They are to be admitted, however, as individuals, not as a class or group; and it is as individuals that their rights under the Constitution are asserted. . . . [The] school board must pass upon individual applications made individually to the board. . . ." 238 F.2d at 729.

In *Covington v. Edwards*, 4 Cir. 1959, 264 F.2d 780, 783, the court commented that "the County board has taken no steps to put an end to the planned segregation" but still held for the board for failure of the plaintiffs to exhaust their remedies and for filing the suit as a class action. In a later opinion in this case, sub.nom. *Jeffers v. Whitley*, 309 F.2d 621, the Court found that the plaintiffs had failed to establish that they were "denied any constitutional right because of their race or color". The court observed,

> "It can fairly be said that what the children and their parents are still seeking is only a desegregation of the Conwell County School System rather than a protection of their own rights. . . ."

The Fourth Circuit abandoned this view in *Green v. School Board of the City of Roanoke*, 4 Cir. 1962, 304 F.2d 118, holding that since administrative remedies need not be exhausted, a class suit is proper. "[It] would be almost a cruel joke to say that administrative remedies must be exhausted when it is known that such exhaustion of remedies will not terminate the pattern of a racial assignment." *Jackson v. School Board of City of Lynchburg*, W.D.Va. 1962, 201 F. Supp. 620. *McNeese v. Board of Education for School District 187*, 1963, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622, put beyond debate the need to exhaust remedies and the right of Negro students to file a class action. See also *Armstrong v. Board of Education of the City of Birmingham*, 5 Cir. 1963, 323 F.2d 333, cert. denied sub.now. *Gibson v. Harris*, 376 U.S. 905 (1964).

In the sense that an individual pupil's right under the equal protection clause is a "personal and present" right not to be discriminated against by being segregated,[60] the dictum is a cliché. The Fourteenth

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the ultimate responsibility for administering a nondiscriminatory system of public education should have the initial burden of coming forward *since a presumption of unconstitutionality arises* under this set of facts." 207 F. Supp. at 825. (Emphasis added.) The facts were "highly probative" of intentional racial discrimination and the evidence of intent rested largely with the Board. The Board came forward and showed tht its plan was based on such neutral factors as the safety of the children, facilities, location, and access roads. The court, however, held that the Board did not rebut the presumption by showing that the plan could be justified as rational and nondiscriminatory. The obviously sophisticated trial judge observed, "In effect, counsel is asking the States to intentionally gerrymander districts which may be rationale when viewed by acceptable, nondiscriminatory criteria". *Id.* at 824.

[59] See U.S. Comm. on Civil Rights, Civil Rights U.S.A.—Public Schools, Southern States (1962), p. 7.

[60] For example: ". . . the essence of the constitutional right is that it is a personal one. . . . It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the auhority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his

Amendment provides, "nor shall any state . . . deny to any *person* within its jurisdiction the equal protection of the laws". The dictum may also be defensible, if the *Briggs* court used the term "integration" to mean an absolute command at all costs that each and every Negro child attend a racially balanced school.[61] But what is wrong about the dictum is more important than what is right about it. What is wrong about *Briggs* is that it drains out of *Brown* that decision's significance as a class action to secure equal educational opportunities for Negroes by compelling the states to reorganize their public school systems.[62] All four of the original *School Segregation* cases were class actions and described as such in the opinions, 347 U.S. at 455.

We do not minimize the importance of the Fourteenth Amendment rights of an individual, but there was more at issue in *Brown* than the controversy between certain schools and certain children. *Briggs* overlooks the fact that Negroes collectively are harmed when the state, by law or custom, operates segregated schools or a school system with uncorrected effects of segregation.

Denial of access to the dominant culture, lack of opportunity in any meaningful way to participate in political and other public activities, the stigma of apartheid condemned in the Thirteenth Amendment are concomitants of the dual educational system. The unmalleable fact transcending in importance the harm to individual Negro children is that the separate school system was an integral element in the Southern State's general program to restrict Negroes as a class from participation in the life of the community, the affairs of the State, and

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constitutional privilege has been invaded". McCabe v. Atchison, T. & S.F. Ry., 1914, 235 U.S. 151, 161-62, 35 S.Ct. 69, 59 L.Ed. 169. The legislative history of the 14th Amendment provides no information on this point. See Frank and Munro, The Original Understanding of Equal Protection of the Laws, 50 Colum. L. Rev. 131 (1950); Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1 (1955). But "the personal nature of the right to be free from discrimination was declared in order to make the existence of such right independent of the number of other members of the *same* racial group who were victimized by the discrimination. . . . Hartman, The Right to Equal Educational Opportunities as a Personal and Present Right, 9 Wayne L. Rev. 424, 427 (1963).

[61] What is meant by the statement of "no duty to integrate" is that a school board "does not have to completely alter boundaries and to insure that every school district is mixed, even though some students will have a great distance to travel . . . [E]ven though the state is not required to integrate fully every school and child, this does not mean that the state may not have certain responsibilities to children of a minority race while educating them, the failure to perform which may be unconstitutional". Seiler, School Segregation in the North and West: Legal Aspects, 7 St. Louis U.L.J. 228, 251 (1963). See also the discussion of Barksdale v. Springfield School Comm., at 65-67, infra.

[62] Rule 23a, Fed. R.Civ. P., before the recent amendments, was unclear as to whether a favorable decree applies to members of the class who do not join in the suit. *Compare* 3 Moore, Federal Practice 3434 (2d Ed.) *with* Chafee, Some Problems in Equity 199-295 (1950). "In dealing with [segregation] cases, courts have largely disregarded Moore's classifications, and have indicated that an injunction would run to the benefit of absentees." Developments in the Law—Multiparty Litigation in the Federal Courts, 71 Harv. L. Rev. 874, 935 (1958). Citing *Brown II*, 349 U.S. at 300-301 dictum; *Brown I*, 347 U.S. at 495 (dictum); Orleans Parish School Board v. Bush, 5 Cir. 1957, 242 F.2d 156, 165-66 (dictum); Browder v. Gayle, M.D. Ala. 1956, 142 F. Supp. 707, 711, 714, aff'd per curiam, 352 U.S. 903 (1956); Frasier v. Board of Trustees of University of North Carolina, M.D. N.C. 1955, 134 F. Supp. 589, *aff'd per curiam*, 350 U.S. 979 (1956).

"Violations of the Fourteenth Amendment are of course violations of individual or personal rights, but where they are committed . . . generally because of race, they are no less entitled to be made the subject of class actions and class adjudications under Rule 23, . . . than are other several rights." Kansas City v. Williams, 8 Cir. 1953, 205 F.2d 47, 52, *cert. denied* 346 U.S. 826 (1953). See also Holmes v. City of Atlanta, N.D. Ga. 1954, 124 F. Supp. 290, aff'd 223 F.2d 93, judgment vacated and remanded for a broader decree in conformity with Mayor and City of Baltimore v. Dawson, 350 U.S. 977 (1955); Jeffers v. Whitley, 4 Cir. 1962, 309 F.2d 621; Brunson v. Board of Trustees of School District No. 1, 4 Cir. 1962, 311 F.2d 107, *cert. denied* 373 U.S. 933 (1963).

See comment, The Class Action Device in Antisegregation Cases, 20 U. Chi. L. Rev. 577 (1953). See also Comment, Multiparty Litigation in the Federal Courts, 71 Harv. L. Rev. 874, 935; McKay, "With All Deliberate Speed"—A Study of School Desegregation, 31 N.Y.U.L. Rev. 991, 1084-86 (1956); Class Actions—A Study of Group Interest Litigation, 1 Race Rel. Rep. 991 (1956); Meador, The Constitution and the Assignment of Pupils to Public Schools, 45 Va. L. Rev. 517, 523 (1959).

the mainstream of American life: Negroes must keep their place.[63]

"[S]egregation is a group phenomenon. Although the effects of discrimination are felt by each member of the group, any discriminatory practice is directed against the group as a unit and against individuals only as their connection with the group involves the anti-group sanction. . . . [As] a group-wrong . . . the mode of redress must be group-wide to be adequate."[64] Adequate redress therefore calls for much more than allowing a few Negro children to attend formerly white schools; it calls for liquidation of the state's system of de jure school segregation and the organized undoing of the effects of past segregation. "Beyond [a child's] personal right [under the Fourteenth Amendment] however, or perhaps as an aspect of it, the lower federal courts seem to be recognizing a right in Negro school children, enforceable at least by a class action, *to have the school system administered free of an enforced policy of segregation* irrespective of whether any colored pupil has been denied admission to any particular school on the ground of his race."[65]

It is undoubtedly true that the intangible inadequacies of a segregated education harm the individual, but the Supreme Court treated these inadequacies as inherent attributes which prevail universally.[66] For example, the Court said:

> [Education] is the very foundation of good citizenship. Today it is a principal instrument in *awakening the child to cultural values*, in preparing him for later professional training, and in *helping him to adjust normally to his environment*. In these days, it is doubtful that any child may reasonably be expected to succeed if he is denied the opportunity of an education. Such an opportunity where the state has undertaken to provide it, is a right which must be made available to all on aqual terms 347 U.S. at 493. (Emphasis added.)

Again, in a critical passage:

> To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and mind in a way unlikely ever to be undone. 347 U.S. at 494.

With this predicate it is not surprising that *Brown II*, a year after

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[63] In United States v. Louisiana, E.D. La. 1963, 225 F. Supp. 353, aff'd 380 U.S. 145, the court traced the history of voting in Louisiana to show that the black codes, the grandfather clause, the white primary, literacy tests, and other devices were all members of a seemingly endless series designed to bar access of Negroes to the dominant culture and to political power. The same situation exists with regard to denial of equal educational opportunities. So-called freedom of choice plans, *as thus far utilized*, follow pupil placement laws, which followed the "separate-but-equal" dodge in the educational series of devices to limit access of Negroes to the polity.

[64] Note, 20 U. Chi. L. Rev. 577 (1953).

[65] Meador, The Constitution and the Assignment of Pupils to Public Schools, 45 Va. L. Rev. 517, 523 (1959).

[66] In *Brown* the unanimous court, through Chief Justice Warren cited the Slaughter House Cases 1872 83 U.S. (16 Wall.) 36, 71 in which the Court stated: ". . . one pervading purpose found in [all of these amendments], lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited domain over him. It is true that only the Fifteenth Amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth." The Court also quoted the following passage from Strauder v. West Virginia, 1879, 100 U.S. 303, 307: "The words of the amendment . . . contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race."

Brown I was decided, going beyond recognition of the "*personal*" right in the individual plaintiffs, fashioned a remedy appropriate for the class. The Court imposed on the states the duty of furnishing an integrated school system, that is, the duty of "effectuat[ing] a transition to a racially nondiscriminatory school *system*."[67] (Emphasis added.) In addition, *Brown II* subordinated the "present" right in the individual plaintiffs to the right of Negroes as a class to a unitary, nonracial system—some time in the future.[68]

The central vice in a formerly de jure segregated public school system is apartheid by dual zoning: in the past by law, the use of one set of attendance zones for white children and another for Negro children, and the compulsory initial assignment of a Negro to the Negro school in his zone. Dual zoning persists in the continuing operation of Negro school identified as Negro, historically and because the faculty and students are Negroes. Acceptance of an individual's application for transfer, therefore, may satisfy that particular individual; it will not satisfy the class. The class is all Negro children in a school district attending, by definition, inherently unequal schools and wearing the badge of slavery separation displays. Relief to the class requires school boards to desegregate the school from which a transferee comes as well as the school to which he goes. It requires conversion of the dual zonse into a single system. Faculties, facilities, and activities as well as student bodies must be integrated. No matter what view is taken of the rationale in *Brown I*, *Brown II* envisaged the remedy following the wrong, the state's correcting its discrimination against Negroes as a class, through separate schools, by initiating and operating a unitary integrated school system. The gradual transition the Supreme Court authorized was to allow the states time to solve the administrative problems inherent in that change-over. *No delay would have been necessary if the right at issue in* Brown *had been only the right of individual Negro plaintiffs to admission to a white school. Moreover, the delay of one year in deciding* Brown II *and the gradual remedy* Brown II *fashioned can be justified only on the ground that the "personal and present" right of the individual plaintiffs must yield to the overriding right of Negroes as a class to a completely integregated public education.*

Although psychological harm and lack of educational opportunities to Negroes may exist whether caused by de facto or de jure segregation.

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[67] "[T]he courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. . . . To that end the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, *personnel*, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems." Brown v. Board of Education, 349 U.S. 294, 300-01. (Emphasis added.)

[68] "If it is the Negro population as a minority group which is entitled to attend public facilities, then the objective of any corrective plan would be to bring about complete integration of all Negro children in public education." Hartman, The Right to Equal Educational Opportunities as a Personal and Present Right, 9 Wayne L. Rev. 424, 441 (1963). Cf. Greenberg, Race Relations and Group Interests in the Law, 13 Rutgers L. Rev. 503, 506 (1959). There would be no necessary conflict between the individual's "personal and present" right and the class right if the Brown, Cooper v. Aaron, Bradley, and Rogers v. Paul decisions were read as recognizing the immediate right of any Negro plaintiff to transfer to a white school, over and above the state's duty to reorganize tis school system. Thus in Watson v. City of Memphis, 1963, 373 U.S. 526, 533, 83 S.Ct. 1314, 10 L.Ed 2d 529, the Supreme Court stated that the rights asserted in that case "are, like all such rights, present rights . . . warrants for the here and now and, unless there is an overwhelmingly compelling reason they are to be promptly fulfilled."

a state policy of apartheid aggravates the harm. Thus, Chief Justice Warren quoted with approval the finding of the district court in the *Kansas* case: "The impact [of the detrimental effect of segregation upon Negro children] is greater when it has the sanction of the law; for the policy of separating the race is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive *in a racial[ly] integrated school system.*" (Emphasis added.) *Brown I*, 347 U.S. at 494. The State, therefore, should be under a duty to take whatever corrective action is necessary to undo the harm it created and fostered.[69] "State authorities were thus *duty bound* to devote every effort toward *initiating desegregation* and bringing about the elimination of racial discrimination in the public school *system.*" (Emphasis added.) *Cooper v. Aaron*, 358 U.S. at 7. Some may doubt whether tolerance of de facto segregation is an unsubtle form of state action. There can be no doubt as to the nature and effect of segregation that came into being and persists because of state action as part of the longstanding pattern to narrow the access of Negroes to political power and to the life of the community.

In a school system the persons capable of giving class relief are of course its administrators. It is they who are under the affirmative duty to take corrective action toward the goal of one integrated system. As Judges Sobeloff and Bell said in *Bradley* v. *School Board of the City of Richmond*, 4 Cir. 1965, 345 F.2d 310, 322:

> ". . . *the initiative in achieving desegregation of the public schools must come from the school authorities. . . . Affirmative action means more than telling those who have long been deprived of freedom of educational opportunity, 'You now have a choice.'* . . . It is now 1965 and high time for the court to insist that good faith compliance requires administrators of schools to proceed actively with *their* nontransferable duty to undo the segregation which both by action and inaction has been persistently perpetuated. (Emphasis added.)

In *Northcross v. Board of Education of the City of Memphis*, 6 Cir. 1962, 302 F.2d 818, the defendants asserted, as the defendants assert here, that continued segregation is "voluntary on the part of Negro pupils and parents because they do not avail themselves of the transfer provisions." The Court held: "The Pupil Assignment Law . . . will not serve as a plan to convert a biracial system into a nonracial system . . . Negro children cannot be required to apply for that to which they are entitled as a matter of right. . . . *The burden rests with the school authorities to initiate desegregation . . . [The Board]*

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[69] "Indeed, the requirement of affirmative action lies at the very heart of Brown: seventeen states had to abandon racial criteria and affirmatively reorganize school attendance plans." Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 Harv. L.Rev. 564, 612 (1965). See also Gilmor and Gosule, Duty to Integrate Public Schools? Some Judicial Responses and a Statute, 46 Bost. U.L. Rev. 45, 62-3 (1966). "State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the equal protection clause." Cooper v. Aaron, 1958, 358 U.S. 1, 19, 78 S. Ct. 1401, 3 L.Ed.2d 5. ". . . Most of the major decisions of the Warren Court under the equal protection clause impose affirmative obligations upon the states. Earlier cases sustaining a constitutional claim were typically mandates directing the government to refrain from a particular form of regulation. Now the emphasis is upon measures the states must adopt in carrying on their activities and steps they must take [even] to offset disabilities not of their creation". Cox, Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 93 (1966).

should submit some realistic plan for the organization of their schools on a nonracial basis". (Emphasis added.) In *Dowell v. School Board of Oklahoma City Public Schools*, W. D. Okla. 1965, 244 F. Supp. 971, 975, 978–79, the School Board in Oklahoma City had "superimposed" a geographic zone plan on "already existing residential segregation initiated by law." The court held: A school board must "adopt policies that would increase the percentage of pupils who are obtaining a desegregated education. . . . [The] failure to adopt an affirmative policy is itself a policy, adherence to which, at least in this case, has slowed up. . . the desegregation process. . . . [W]*here the cessation of assignment and transfer policies based solely on race is insufficient to bring about more than token change in the segregated system, the Board must devise affirmative action reasonably purposed to effectuate the desegregation goal.* This conclusion makes no new law."

The position we take in these consolidated cases is that *the only adequate redress for a previously overt system-wide policy of segregation directed against Negroes as a collective entity is a system-wide policy of integration.* In *Singleton I* the Court touched on the states duty to integrate:

> "In retrospect, the second Brown opinion clearly imposes on public school authorities the duty to provide an integrated school system. Judge Parker's well-known dictum should be laid to rest. It is inconsistent with Brown and the later development of decisional and statutory law in the area of civil rights." 348 F.2d at 730 n.5.

Three years before *Singleton I* this Court analyed the problem in *Potts v. Flax*, 5 Cir. 1963, 313 F.2d 284. In that case the Court rejected a school board's contention that a suit brought by two Negro parents was not a class action even though the record contained testimony that one parent was bringing the action only for his own children and not for other Negro children. The Board contended that a court order was not needed because it was willing to admit any Negro child to a white school on demand of any Negro child. Judge Brown, speaking for the Court, said:

> "Properly construed the purpose of the suit was not to achieve specific assignment of specific children to any specific grade or school. The peculiar rights of specific individuals were not in controversy. It was directed at the *system-wide policy* of racial segregation. It sought obliteration of that policy of system-wide racial discrimination. . . ."[70]

Even before *Potts v. Flax*, in *Bush v. Orleans Parish School Board*, 5 Cir. 1962, 308 F.2d 492, 499, the Court said:

> "In this aspect of [initial] pupil assignment [to segregated schools] the facts present a clear case where there is not only deprivation of the rights of the individuals directly concerned but

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[70] The Court also said: "There is at least considerable doubt that relief confined to individual specified Negro children either could be granted or, if granted, could be so limited in its operative effect. By the nature of the controversy, the attack is on the unconstitutional practice of racial discrimination. Once that is found to exist, the Court must order that it be discontinued. Such a decree, of course, might name the successful plaintiff as the party not to be discriminated against. But that decree may not—either expressly or impliedly—affirmatively authorize continued discrimination by reason of race against others. Cf. Shelley v. Kramer, 1948, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161. Moreover, to require a school system to admit the specific successful plaintiff Negro child while others, having no such protection, were required to attend schools in a racially segregated system, would be for the court to contribute actively to the *class* discrimintion proscribed by Bush v. Orleans Parish School Board, 5 Cir 1962, 308 F.2d 491, 499, on rehearing 308 F.2d 503; see also Ross v. Dyer, 5 Cir. 1962, 312 F.2d 191." Potts v. Flax, 313 F.2d at 289.

> deprivation of the rights of Negro school children as a class. As a class, and irrespective of any individual's right to be admitted on a non-racial basis to a particular school, Negro children in the public schools have a constitutional right to have the public school system administered free from an administrative policy of segregation."[71]

See also *Ross* v. *Dyer*, 5 Cir. 1963, 312 F.2d 191, 194–95; *Augustus v. Board of Public Instruction* of Escambia County, 5 Cir. 1963, 306 F.2d 862, 869; *Holland v. Board of Public Instruction of Palm Beach County*, 5 Cir. 1958, 258 F.2d 730; *Orleans Parish School Board v. Bush*, 5 Cir. 1957, 242 F.2d 156.

Brown was an inevitable, predictable extension of *Sweatt v. Painter*, 1950, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 114, and *McLaurin v. Oklahoma State Regents*, 1950, 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149.[72] Those cases involved separate but equal or identical graduate facilities. Factors "incapable of objective measurement" but crucial to a good graduate education were not available to segregated Negroes. These were the intangible factors that prevented the Negro graduate students from having normal contacts and association with white students. Apartheid made the two groups unequal. In *Brown I* these same intangibles were found "to apply with added force to children in grade and high schools"; educational opportunity in public schools must be made available to all on equal terms.

The *Brown I* finding that segregated schooling causes psychological harm and denies equal educational opportunities should not be construed as the sole basis for the decision.[73] So construed, the way would be open for proponents of the status quo to attempt to show, on the facts, that integration may be harmful or the lesser of two evils. Indeed that narrow view of *Brown I* has led several district courts into error.[74] We think that the judgment "must have rested on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed." [75] The relief *Brown II* requires rests on recognition of the principle that state-imposed separation by race is an invidious classification and for that reason alone is unconstitutional.[76] Classifications based upon race are especially suspect, since they are "odious to a free people." [77] In short, compulsory separation, apartheid, is per se discriminatory against Negroes.

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[71] The Court also said: "Geographical districts based on race are a parish-wide system of unconstitutional classification. Of course, it is undoubtedly true that Brown v. Board of Education dealt with only an individual child's right to be admitted to a particular school on a non-racial basis. And it is also true, as the second Brown opinion pointed out, that courts must bear in mind the 'personal interest' of the plaintiffs. In this sense, the Brown cases held that the law requires non-discrimination as to the individual, not integration. But when a statute has a state-wide discriminatory effect or when a School Board maintains a parish-wide discriminatory policy or system, the discrimination is against Negroes as a class. Here, for example, it is the Orleans Parish dual system of segregated school districts, affecting all school children in the Parish by race, that, first, was a discriminatory classification, and, second, established the predicate making it possible for the Pupil Placement Act to fulfill its behind-the-face function of preserving segregation." Bush v. Orleans Parish School Board, 308 F.2d at 499.

[72] See, for example, Ransmeier, The Fourteenth Amendment and the "Separate but Equal" Doctrine, 50 Mich. L. Rev. 203, 238–40 (1951); Roche, Education, Segregation and the Supreme Court—A Political Analysis, 99 U. Pa. L. Rev. 949 (1951); Taylor, The Demise of Race Restrictions in Graduate Education, 1 Duke B. Jour. 135 (1951); Note, 26 St. John's L. Rev. 123 (1951).

[73] Professor Edmond Cahn characterized as a "myth" the notion that the Brown decision was "sociological" rather than "legal". Cahn, Jurisprudence, 31 N.Y.U. L. Rev. 182 (1956); Cahn, Jurisprudence, 30 N.Y.U. L. Rev. 150 (1955). "I would not have the constitutional rights of Negroes—or of other Americans—rest on any such flimsy foundation as some of the scientific demonstrations in these records. . . . Heretofore, no government official has contended that he could deny equal protection with impunity unless the complaining parties offered competent proof that they would sustain or had sustained some permanent (psychological or other kind of) damage. The right to equal protection has not been subjected to any such proviso." Cahn, Jurisprudence, 30 N.Y.U. L. Rev. 150, 157, 158, 168 (1955). Professor Black has said: "The charge that it is 'sociological' is either a truism or a canard—a truism if it means that the Court, precisely like the *Plessy* court, and like innumerable other courts facing innumerable other issues of law, had to resolve and did resolve a question about social fact; a canard if it means that anything like principal reliance was placed on the formally 'scientific' authorities, which are relegated to a footnote and treated as merely corroboratory of common sense." Black, The Lawfulness of the Segregation Decision, 69 Yale L.J. 421, 430 n.25 (1960).

Acceptance of these views is not inconsistent with the continued vitality of the psychological findings in *Brown I*. Indeed, several studies have reinforced those findings. The most recent is the United States Office of Education's "Equality of Educational Opportunity", the two-year study authorized by section 402 of the Civil Rights Act of 1964 to investigate "the lack of availability of equal educational opportunities for individuals by reason of race, color, religion, or national origin in public educational institutions. . . ." 42 U.S.C. § 2000c–1.

A number of post-*Brown* per curiam decisions not involving education make it clear that the broad dimensions of the rationale are not circumscribed by the necesity of showing *harmful* inequality to the individual. In these cases Negroes were separated from whites but were afforded equal or identical facilities. Relying on *Brown*, the Court ordered integration of the facility or activity.[78] See also *Anderson v. Martin*, 1964, 375 U.S. 399, 402, 84 S.Ct. 454, 11 L.Ed.2d 430, 433, holding that compulsory designation of a candidate's race on the ballot is unlawful. The designation placed "the power of the State behind a racial classification that induces racial prejudice at the polls."

Bolling v. Sharpe, 1954, 347 U.S. 497, 74 S.Ct. 693, 98 L. Ed. 884, provides further evidence of the breadth of the right recognized in *Brown*. There, because the case concerned the District of Columbia, the Court had to rely on the due process clause of the Fifth Amendment instead of the equal protection clause of the Fourteenth Amendment. Going beyond any question of psychological harm or of the denial of equal educational opportunties to the individual, the Court concluded that racial classifications in public education are so unreasonable and arbitrary as to violate due process: [79]

> "Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. *Segregation in public education is not reasonably related to any proper governmental objective*, and thus it imposes on Negro children . . . a burden that

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[74] See Stell v. Savannah-Chatham County Board of Education S.D.Ga. 1963, 220 F. Supp. 667, rev'd 333 F.2d 55; 255 F.Supp. 84 (1965), appeal pending; 255 F.Supp. 88 (1966), appeal pending. See also Jackson Municipal Separate School District v. Evers, 5 Cir. 1966, 357 F.2d 653.

[75] Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 33 (1959). Professor Wechsler concluded: "For me, assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate . . . ." The article started a vigorous debate. See authorities collected in Emmerson and Huber, Political and Civil Rights 1625–1629 (1967). See also Kaplan, Equality in an Unequal World, 61 NW U.L. Rev. 363 (1966).

For discussion of the inherently "arbitrary" classification principle against the principle of equality of educational opportunity, see Fiss, Racial Imbalance in the Public Schools: The Constitutional Concept, 78 Carv. L. Rev. 564, 590–98 (1965).

[76] See Pollak, Racial Discrimination and Judicial Integrity: A reply to Professor Wechsler, 108 U. Pa. L. Rev. 1 (1959); Kaplan, Segregation Litigation and the Schools—Parts I. The New Rochelle Experience 58 NW U. L. Rev. 1, 21 (1964).

[77] Korematsu v. United States, 1944, 323 U.S. 214, 216, 65 S. Ct. 193, 89 L. Ed. 194.

[78] E.g., Schiro v. Bynum, 375 U.S. 395 (1964) (municipal auditoriums); Johnson v. Virginia, 373 U.S. 61 (1963) (court-rooms); State Athletic Comm'n v. Dorsey, 395 U.S. 533 (1959) (athletic contests) New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (public parks and golf courses) Gayle v. Browder, 352 U.S. 903 (intrastate busses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (municipal golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beaches and bathhouses), Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954) (municipal amphitheater). For lower court decisions to the same effect, see cases collected in Emmerson and Huber, Political and Civil Rights in the United States 1678 (1967).

[79] See Cahn, Jurisprudence, 30 N.Y.U.L. Rev. 150, 155 (1955). Cf. Antieau, Equal Protection Otuside the Clause, 40 Cal. L. Rev. 362, 364 (1954); Pollak, Racial Discrimination and Judicial Integrity, 108 U. Pa. L. Rev. 1, 27–28 (1959).

> constitutes an arbitrary deprivation of their liberty." 347 U.S. at 498. (Emphasis added.)

As in the jury exclusion cases, when the classification is not "reasonably related to any proper governmental objective" equal protection and due process merge.

If *Brown* has only the narrow meaning *Briggs* gives it, the system of state-sanctioned segregated schools will continue indefinitely with only a little token desegregation. White school boards, almost universal in this circuit, will be able to continue to say that their constitutional duty ends when they provide relief to the particular Negro children who, as individuals, claim their personal right to be admitted to white schools. If the *Briggs* thinking should prevail, the dual system will, for all practical purposes, be maintained: white school officials in most key positions at the state and county levels; Negro faculties in Negro schools, white faculties in white schools; no white children or only a few white children of way-out parents in Negro schools; a few Negroes in some white schools; at best, tokenism in certain school districts.

Brown's broad meaning, its important meaning, is its revitalization of the national constitutional right the Thirteenth, Fourteenth, and Fifteenth Admendments created in favor of Negroes. This is the right of Negroes to *national* citizenship, their right as a class to share the privileges and immunities only white citizens had enjoyed as a class. *Brown* erased *Dred Scott*, used the Fourteenth Amendment to breathe life into the Thirteenth, and wrote the Declaration of Independence into the Constitution. Freed men are free men. They are created as equal as are all other American citizens and with the same unalienable rights to life, liberty, and the pursuit of happiness. No longer "beings of an inferior race"—the *Dred Scott* article of faith—Negroes too are part of "the people of the United States".

A primary responsibility of federal courts is to protect nationally created constitutional rights. A duty of the States is to give effect to such rights—here, by providing equal educational opportunities free of any compulsion that Negroes wear a badge of slavery. The States owe this duty to Negroes, not just because every citizen is entitled to be free from arbitrary discrimination as a heritage of the common law or because every citizen may look to his state for equal protection of the rights a state grants its citizens. As Justice Harlan clearly saw in the *Civil Rights Cases* (1883), 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835, *the Wartime Amendments created an affirmative duty that the States eradicate all relics, "badges and indicia of slavery" lest Negroes as a race sink back into "second-class" citizenship.*

B. The factual situation dealt with in *Bell v. School City of Gary*, N.D. Ind. 1963, 213 F. Supp. 819, *aff'd* 7 Cir. 1963, 324 F.2d 209, *cert. den'd* 377 U.S. 924 (1964) is not the situation the Supreme Court had before it in *Brown* or that we deal with in this circuit. *Brown* dealt with state-imposed segregation based on dual attendance zones. *Bell* involved nonracially motivated de facto segregation in a school system based on the neighborhood single zone system. In *Bell* the plaintiffs alleged that the Gary School Board had deliberately gerrymandered school attendance zones to achieve a segregated school system in violation of its "duty to provide and maintain a racially integrated system". On the showing that the students were assigned and boundary lines drawn based upon reasonable nonracial criteria, the court held that the school board did not deliberately segregate the races: the racial balance was attributable to geographic and housing patterns. The court analyzed the problem in terms of state action rather than in terms of the Negroes' right to equal educational opportunities. Finding no state action the court concluded that *Brown* did not apply. In effect, the court held that de facto segregated neighborhood schools must be accepted. At any rate, the court said, "states do not have an affirmative duty to provide an integrated education". The Seventh Circuit affirmed.

We must assume that Congress was well aware of the fact that *Bell* was concerned with de facto segregated neighborhood schools—only. Notwithstanding the broad language of the opinion relating to the lack of a duty to integrate, language later frequently quoted by Senator Humphrey and others in the debates on the Civil Rights Act of 1964, Congress went only so far as to prohibit cross-district busing and cross-district assignment of students.

The facts, as found by the Court in *Bell*, favored the Gary School Board. Other courts, on very similar facts, have decided that there are alternatives to acceptance of the status quo.[80] A commentator on the subject has fairly summed up the cases: "Using *Brown* as a governing principle, racial imbalance caused by racially motivated conduct is clearly invalid. When racial imbalance results fortuitously, there is a split of authority."[81]

Barksdale v. Springfield School Committee, D. Mass. 1965, 237 F. Supp. 543, similar on the facts to *Bell*, holds squarely contrary to *Bell*:

> "The defendants argue, nevertheless, that there is no constitutional mandate to remedy racial imbalance. Bell v. School City of Gary, 324 F.2d 209 (7th Cir. 1963). But that is not the question. *The question is whether there is a constitutional duty to provide equal educational opportunities for all children within the system.* While

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[80] "The central constitutional fact is the inadequacy of segregated education. . . . The educational system that is thus compulsory and public afforded must deal with the inadequacy arising from adventitious segregation; it cannot accept and indurate segregation on the ground that it is not coerced or planned but accepted." Branche v. Board of Education, 204 F. Supp. at 153. See Wright, Public School Desegregation: Legal Remedies for De Facto Segregation, 40 N.Y.U.L. Rev. 285, 301 (1965); Fiss, 78 Harv. L. Rev. 564, 609 (1965) (a relative approach); Sedler, School Segregation in the North and West: Legal Aspects, 7 St. Louis U. L. Rev. 228, 233-239, 275 (1963); Maslow, De Facto Public School Segregation, 6 Vill. L. Rev. 353 (1961).

[81] King, Racial Imbalance in the Public Schools, 18 Vand. L. Rev. 1290, 1337 (1965). Webb v. Board of Education of Chicago, N.D.Ill. 1963, 223 F.Supp. 466; Deal v. Cincinnati Board of Education, S.D.Ohio 1965, 2 F.Supp. 572; Lynch v. Kenston School District, N.D. Ohio 1964, 229 F.Supp. 740; Downs v. Board of Education, 10 Cir. 1965, 336 F.2d 988, cert. denied 380 U.S. 914, 85 S.Ct. 898, 13 L.Ed. 2d 800; and Sealy v. Department of Public Instruction of Pennsylvania, 3 Cir. 1958, 252 F.2d 898, are more or less in agreement with *Bell*. These cases usually rely on the school board's good faith, lack of racial motivation, and the propriety of considering transportation, geography, safety, access roads, and other neutral criteria as national cases for school districting. Taking the contrary position are: Booker v. Board of Education of Plainfield, 1965, 45 N.J. 161, 212 A.2d 1; Branche v. Hempstead, E.D.N.Y. 1962, 204 F.Supp. 150; Blocker v. Board of Education of Manhasset, E.D.N.Y. 1964, 226 F. Supp. 208, 229 F. Supp. 709; Barksdale v. Springfield School Committee, D.Mass. 1965, 237 F.Supp 543, vacated for other reasons 1 Cir. 1965, 348 F.2d 261; Jackson v. Pasadena City School District, 1962, 59 Cal. 2d 876, 31 Cal. Rptr. 606, 382 P.2d 878. School authorities may act to offset racial imbalance: See Addabbo v. Donovan, 256 N.Y.S. 2d 178, aff'd 261 N.Y.S.2d 68, 209 N.E.2d 112 (1965), *cert. den'd* 382 U.S. 905 (1965). See also Balaban v. Rubin, 248 N.Y.S.2d 574, aff'd 250 N.Y.2d 281, 199 N.E.2d 375 (1964), *cert. den'd* 379 U.S. 881 (1964) (Board may "take into consideration the ethnic composition of the children" before drawing the attendance lines for a new school); Olson v. Board of Edcation, E.D.N.Y. 1966, 250 F. Supp. 1000 (the Princeton plan—see note 124, infra); Offerman v. Nitkowski, W.D. N.Y. 1965, 248 F.Supp. 129; Guida v. Board of Education of New Haven, 26 Conn. Supp. 121, 213 A2d 843 (1965); Strippoli v. Bickal, 250 N.Y.S.2d 969, Aff'd N.Y.S.2d 84, 209 N.E.2d 123 (1965) (busing); Morean v. Board of Education (42 N.J. 237, 200, A.2d 97 (1965); Vetere v. Allen, 258 N.Y. 77, 206 N.E.2d 174 (1965) (redistricting of attendance zone approved because "racial balance is essential to a sound education"); Van Blerkom v. Donovan, 1965, 15 N.Y.2d 399, 259 N.Y.S.2d 825, 207 N.E.2d 503.

> Brown answered that question affirmatively in the context of coerced segregation, the constitutional fact—the inadequacy of segregated education—is the same in this case, and I so find. . . . *This is not to imply that the neighborhood school policy per se is unconstitutional, but that it must be abandoned or modified when it results in segregation in fact.*
> . . . I cannot accept the view in *Bell* that only forced segregation is incompatible with the requirements of the Fourteenth Amendment, *nor do I find meaningful the statement that '[t] Constitution . . . does not require integration. It merely forbids discrimination.'* 324 F.2d *at* 213. . . . • This court recognizes and reiterates that the problem of racial concentration is an educational, as well as constitutional, problem and, therefore, orders the defendants to present a plan no later than April 30, 1965, *to eliminate to the fullest extent possible* racial concentration in its elementary and junior high schools within the framework of effective educational procedures, as guaranteed by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States." (Emphasis added.)

"In short, *Barksdale* [does not analyze *Brown*] in terms of propriety of school board action, but proceeds in terms of a right on the part of Negro students to an equal educational opportunity, which in light of the ruling in *Brown* that separate schools are inherently unequal, must perforce be a right to an integrated educational setting." [82] On appeal, the First Circuit accepted the district court's findings of fact but vacated the order with directions to dismiss without prejudice because the school board, on its own initiative, had taken action identical with the court-ordered action. 348 F.2d 261. The Court noted a difference between "the seeming absolutism" of the opinion and the less sweeping order "to eliminate [segregation] to the fullest extent possible . . . within the framework of effective educational procedures." [83] Taking both opinions together, they recognize that "the state would not be permitted to ignore the problem of defacto segregation. The holding in *Brown*, unexplained by its underlying reasoning, requires no more than the decision in *Bell*, but when illuminated by the reasoning, it permits the result in *Barksdale* and may require that result." [84] At the very least, as the *Barksdale* court saw it, there is a duty to integrate in the sense that integration is an educational goal to be given a high priority among the various considerations involved in the proper administration of a system beset with de facto segregated schools.

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[82] Gilmor and Gosule, Duty To Integrate Public Schools? Some Judicial responses and a Statute, 46 Bost. U. L. Rev. 45, 57 (1966).

[83] The First Circuit construed the court's order as not calling for "an absolute right in the plaintiffs to have what the court found to be 'tantamount to segregation' removed at all costs." At the same time, the Court said: "Rather we take it to determine that . . . racial imbalance disadvantages Negro students and impairs their educational opportunities as compared with other races to such a degree that they have a right to insist that the defendants consider their special problems along with all other relevant factors when making relevant decisions." Springfield School Committee v. Barksdale, 1965, 348 F.2d 261, 264.

[84] Gilmor and Gosule supra note 82, at 64. Compare the statement of policy in the Massachusetts statute, An Act Providing for the Elimination of Racial Imbalance in the Public Schools (Mass. Acts. 1965, ch. 641):

> It is hereby declared to be the policy of the commonwealth to encourage all school committees to adopt as educational objectives the promotion of racial balance and the correction of existing racial imbalance in the public schools. The prevention or elimination of racial imbalance shall be an objective in all decisions involving the drawing or altering of school attendance lines and the selection of new school sites.

The statute was enacted a month after *Barksdale* was decided.

Although *Brown* points toward the existence of a duty to integrate de facto segregated schools,[85] the holding in *Brown*, unlike the holding in *Bell* but like the holdings in this circuit, occurred within the context of state-coerced segregation. The similarity of pseudo de facto segregation in the South to actual de facto segregation in the North is more apparent than real. Here school boards, utilizing the dual zoning system, assigned Negro teachers to Negro schools and selected Negro neighborhoods as suitable areas in which to locate Negro schools. Of course the concentration of Negroes increased in the neighborhood of the school. Cause and effect came together. In this circuit, therefore, the location of Negro schools with Negro facilities in Negro neighborhoods and white schools in white neighborhoods cannot be described as an unfortunate fortuity: It came into existence as state action and continues to exist as racial gerrymandering, made possible by the dual system.[86] Segregation resulting from racially motivated gerrymandering is properly characterized as "de jure" segregation. See *Taylor v. Board of Education of the City of New Rochelle*, S.D.N.Y. 1961, 191 F. Supp. 181.[87] The courts have had the power to deal with this situation since *Brown I*. In *Holland* v. *Board of Public Instruction of Palm Beach County*, 5 Cir. 1958, 258 F.2d 730, although there was no evidence of gerrymandering as such, the court found that the board "maintained and enforced" a completely segregated system by using the neighborhood plan to take advantage of racial residential patterns. See *also Evans v. Buchanan*, D.Del. 1962, 207 F. Supp. 820, where, in spite of a genuflexion in the direction of *Briggs*, the Court found that there was gerrymandering of school districts superimposed on a pre-*Brown* policy of segregation.

C. The defendants err in their contention that the HEW and the courts cannot take race into consideration in establishing standards for desegregation "The Constitution is not this color-blind."[88]

The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate governmental purpose. For example, jury venires must represent a cross-section of the community. *Strauder v. West Virginia*, 1880, 100 U.S. 303, 25 L. Ed. 664. The jury commissioners therefore must have a "conscious awareness of race in extinguishing racial discrimination in jury service". *Brooks v. Beto*, 5 Cir. 1966, 366 F.2d 1. Similarly, in voter registration cases we have used the "freezing principle" to justify enjoining the use of a constitutional statute where, in effect, the statute would perpetuate past racial discrimination against Negroes. *United States v. Louisiana*, E.D. La. 1963, 225 F.Supp. 353, aff'd 1965, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 817. "[I]t is unrealistic to suppose that the evils of decades of flagrant race discrimination can be overcome by purging registration rolls of white voters. . . . [U]nless there is some appropriate way to equalize the present with the past, the injunctive prohibitions even in the most stringent, emphatic, mandatory terms prohibiting discrimination in the future, continues for many years a structure committing effectual political power to the already registered whites while excluding Negroes from this vital activity of citizenship." *United States v. Ward*, 5 Cir. 1965, 349 F.2d 795, 802. "An appropriate remedy . . . should undo the results of past discrimination as well as prevent future inequality of treatment." *United States v. Duke*, 5 Cir. 1964, 332 F.2d 759, 768. If the Constitution were absolutely color-blind, consideration of race in the census and in adoption proceedings would be unconstitutional.

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[85] "Some of the Supreme Court's language in *Brown* can apply to this type of segregation as well as to that before the Court, since this type of imbalance may also 'generate a feeling of inferiority as to [the Negro children's] status in the community that may affect their hearts and minds in a way unlikely ever to be undone.' Thus, if one believes that the basis of the *Brown* decision was the Court's finding that separate schools were unconstitutional simply because they bred a feeling of inferiority in the Negro, one must also believe that the neighborhood school must also be unconstitutional if it breeds the same feeling of inferiority." Kaplan, Segregation Litigation and the Schools—Part I: The New Rochelle Experience 58 NW U.L. Rev. 1, 21 (1964). "Necessarily implied in [Brown's] proscription of segregated education was the positive duty of eliminating it." Taylor v. Board of Education of the City of New Rochelle, S.D.N.Y. 1961, 191 F. Supp. 181, 193, aff'd 294 F.2d 36, *cert. denied* 368 U.S. 940.

[86] See Clemons v. Board of Education of Hillsboro, 6 Cir. 1956, 228 F.2d 853, cert. den'd 350 U.S. 1006 (1956). Cf. Gomillion v. Lightfoot, 1960, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110.

[87] Modified plan approved, 195 F.Supp. 231, *aff'd* 2 Cir. 1961, 294 F.2d 36, cert. den'd 368 U.S. 940 (1961). See Kaplan, Segregation Litigation and the Schools—Part I: The New Rochelle Experience, 58 NW.U.L. Rev. 1 (1964). Jackson v. School Board of the City of Lynchburg, W.D. Va. 1962, 203 F. Supp. 701; Dowell v. School Board of Oklahoma City Public Schools, W.D. Okla. 1965, 244 F.Supp. 971; and Swann v. Charlotte-Mecklenburg Board of Education, W.D.N.C. 1965, 243 F.Supp. 667, followed *Taylor* on the unconstitutionality of racial gerrymandering. See also Jackson v. Pasadena City School District, 1963, 59 Cal.2d 876, 382 P.2d 878; Clemons v. Board of Education of Hillsboro, 6 Cir. 1956, 228 F.2d 853, *cert. den'd* 350 U.S. 106 (1956); Fuller v. Volk, 3 Cir. 1965, 351 F.2d 323.

[88] Taylor v. Board of Education of the City of New Rochelle, S.D.N.Y. 1961, 191 F.Supp. 181, 196, *aff'd* 294 F.2d 36 (Kaufman, J.).

Here race is relevant,[89] because the governmental purpose is to offer Negroes equal educational opportunities. The means to that end, such as disestablishing segregation among students, distributing the better teachers equitably, equalizing facilities, selecting appropriate locations for schools, and avoiding resegregation must necessarily be based on race. School officials have to know the racial composition of their school populations and the racial distribution within the school district. The Courts and HEW cannot measure officials' good faith or progress without taking race into account. "When racial imbalance infects a public school system, there is simply no way to alleviate it without consideration of race. . . . There is no constitutional right to have an inequaliy perpetuated."[90] Judge Sobeloff's answer in *Wanner v. County School Board of Arlington County*, 4 Cir. 1966, 357 F.2d 452, 454-55, is our answer in this case:

> "If a school board is constitutionally forbidden to institute a system of racial segregation by the use of artificial boundary lines, it is likewise forbidden to perpetuate a system that has been so instituted. It would be stultifying to hold that a board may not move to undo arangements artificially contrived to effect or maintain segregation, on the ground that this interference

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[89] "The justification for the school board's incorporation of racial distinctions in its correctional scheme is that race is a relevant characteristic, given the school board's purpose, which is to avoid psychological injury to the Negro child, break down social barriers, and mitigate the academic inadequacy of the imbalanced schools. Of course, it might be argued that many of the evils the school board attempts to eliminate when it takes correctional steps are not attributable to the race of the individuals within the imbalanced school, but instead are attributable to their social class. Yet, certain of these evils are uniquely related to the fact that the imbalance is a racial one: namely, those attributable to the personal impact of the imbalance on the Negro. Moreover, most Negroes in the ghetto, and hence attending an imbalanced school, are members of the lowest economic class, and thus the board's remedial measures will tend to cure the social imbalance as well." Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 Harv. L. Rev. 564, 577-78 (1965).

[90] Wright, Public School Desegregation: Legal Remedies for De Facto Segregation, 16 West. Res. L. Rev. 478, 489 (1965).

> with the status quo would involve 'consideration of race.' When school authorities, recognizing the historic fact that existing conditions are based on a design to segregate the races, act to undo these illegal conditions—especially conditions that have been judicially condemned—their effort is not to be frustrated on the ground that race is not a permissible consideration. This is not the 'consideration of race' which the Constitution discountenances. . . . There is no legally protected vested interest in segregation. If there were, then Brown v. Board of Education and the numerous decisions based on that case would be pointless. Courts will not say in one breath that public school systems may not practice segregation, and in the next that they may do nothing to eliminate it."

D. Under *Brigg's* blessing, school boards throughout this circuit first declined to take any affirmative action that might be considered a move toward integration. Later, they embraced the Pupil Placement Laws as likely to lead to no more than a little token desegregation. Now they turn to freedom of choice plans supervised by the district courts. As the defendants construe and administer these plans, without the aid of HEW standards there is little prospect of the plans' ever undoing past discrimination or of coming close to the goal of equal educational opportunities. Moreover, freedom of choice, as now administered, necessarily promotes resegregation. The only relief approaching adequacy is the conversion of the still-functioning dual system to a unitary, nonracial system—lock, stock, and barrel.

If this process be "integration" according to the 1955 *Briggs* court, so be it. In 1966 this remedy is the relief commanded by *Brown*, the Constitution, the Past, the Present, and the wavy fore-image of the Future.

IV.

We turn now to the specific provisions of the Civil Rights Act on which the defendants rely to show that HEW violates the Congressional intent. These provisions are the amendments to Title IV and VI added in the Senate. The legislative history of these amendments is sparse and less authoritative than usual because of the lack of committee reports on the amended version of the bill.

A. Section 401(b) defines desegregation:

> "'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

The affirmative portion of this definition, down to the "but" clause, describes the assignment provision necessary in a plan for conversion of a de jure dual system to a unitary, integrated system. The negative portion, starting with "but", excludes assignment to overcome racial imbalance, that is, acts to overcome de facto segregation. As used in the Act, therefore, "desegregation" refers only to the disestablishment of segregation in de jure segregated schools. Even if a broader meaning should be given to "assignment . . . to overcome racial imbalance", Section 401 would not mean that such assignments are unlawful:

> "The intent of the statute is that no funds and no technical assistance will be given by the United States Commissioner of Education with respect to plans for the assignment of students to

> public schools in order to overcome racial imbalance. The statute may not be interpreted to mean that such assignment is illegal or that reasonable integration efforts are arbitrary or unlawful."[91]

The prohibition against assignment of students to overcome imbalance was added as an amendment during the debates in the House to achieve the same result as the anti-bussing provision in section 407. Some of the difficulty in understanding the Act and its legislative history arises from the statute's use of the undefined term "'racial imbalance". It is clear however from the hearings and debates that Congress equated the term, as do the commenators with "de facto segregation" that is, non-racially motivated segregation in a school system based on a single neighborhood school for all children in a definable area.[92] Thus, Congressman William Cramer who offered the amendment, was concerned that the bill as originally proposed might authorize the government to require bussing to overcome de facto segregation. In explaining the amendment, he said:

> "In the hearings before the committee I raised questions on 'racial imbalance' and in the sub-committee we had lengthy discussions in reference to having these words stricken in the title, as it then consisted, and to strike out the words '*racial imbalance*' proposed by the administration. • The purpose is *to prevent any semblance of congressional acceptance or approval of the concept of 'de facto' segregation* or to include in the definition of 'desegregation' *any balancing of school attendance by moving students across school district lines to level off percentages where one race outweighs another.*"

The neighborhood school system is rooted deeply in American culture.[93] Whether its continued use is constitutional when it leads to grossly imbalanced schools is a question some day to be answered by the Supreme Court, but that question is not present in any of the cases before this Court. As noted in the previous section of this opinion, we have many instances of a heavy concentration of Negroes or whites in certain areas, but always that type of imbalance has been superimposed on total school separation. And always the separation originally was racially motivated and sanctioned by law in a system based on two schools within a neighborhood or overlapping neighborhoods, each school serving a different race. The situations have some similarity but they have different origins, create different problems, and require different corrective action.[94]

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[91] Addabbo v. Donovan, 22 App. Div.2d 383, 256 N.Y.S.2d 178, 184, (2d Dept. 1965), aff'd, 16 N.Y.2d 619, 261 N.Y.S.2d 68, 209 N.E.2d 112 (1965), cert. denied, 382 U.S. 905 (1965).

[92] For example, "Racial imbalance" and "de facto segregation" are "used synonymously . . . [to] refer to a situation where a school is predominantly composed of Negro students not as a result of state action but rather as the end product of segregated housing and adherence to the neighborhood school plan." Gillmor and Gosule, 46 Boston U.L. Rev. 45, 46 (1966). The term "de facto segregation" has become accepted as denoting non racially motivated separation of the races as opposed to "de jure segregation" denoting deliberate separation of the races by law. Since segregation is unconstitutional, each is a contradiction in terms. One student of the problem has pointed out, "The term *de facto* segregation makes the racially imbalanced school appear . . . [to be] the Northern counterpart of segregated education under Jim Crow laws. . . . As such the term distorts reality and paralyzes thought. [Racial] imbalance is frequently labeled 'de facto' segregation to suggest that the requisite governmental involvement cannot be found." Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 Harv. L. Rev. 564, 566, 584 (1965). Another has said, "As a more accurate term, racial imbalance will be used to denote fortuitous racial separation in the public schools", King, Racial Imbalance in the Public Schools: Constitutional Dimensions and Judicial Response, 18 Vand. L. Rev. 1290, 1291 (1965).

"*De facto* segregation has become the short way of describing the existing situation in northern cities . . . a school system which is marked by a very high proportion of Negroes in some of its schools, and few or none in others, but in which this separation has taken place without the compulsion of a state law or officially announced policy requiring that Negro and white children be placed in separate schools." Hyman and Newhouse, Desegregation of the Schools: The Present Legal Situation, 14 Buff. L. Rev. 208, 221 (1964). See also Carter, De Facto Segregation, 16 West. Res. L. Rev. 502, 503 (1965).

[93] "The rationale of the neighborhood school system is that the school serves as the educational, recreational, and cultural center of the community. See Hansen, The Role of Educators, 34 Notre Dame L. Rev. 652, 654 (1959). Proponents of the view that neighborhood schools may become so racially imbalanced as to require affirmative corrective action point out: "The modern-day neighborhood school cannot be equated with the common school of yesteryear—the latter constitutes America's ideal of a democratic institution—a single structure serving a heterogeneous community in which children of varied racial, cultural, religious, and socio-economic backgrounds were taught together—the proverbial melting pot. Because of rigid racial and socio-economic stratification, ethnic and class similarity has become the most salient present-day neighborhood characteristic, particularly in urban areas. The neighborhood school, which encompasses a homogeneous racial and socio-economic grouping, as is true today, is the very antithesis of the common school heritage." Carter, De Facto School Segregation: An Examination of the Legal and Constitutional Questions Presented, 16 West Res. L. Rev. 502, 507 (1965). See also Sedler, School Segregation in the North and West: Legal Aspects, 7 St. Louis U.L.J. 228, 252–56 (1963).

In the 1964 Act (and again in 1966 during consideration of amendments to the Elementary and Secondary Education Act of 1965) Congress, within the context of debates on aid to de facto segregated schools declined to decide just what should be done about imbalanced neighborhood schools.[94a] The legislative solution, if there is one to this problem, will require a carefully conceived and thoroughly debated comprehensive statute. In the 1964 Act Congress simply directed that the federal assistance provided in Title IV, § 403-5 was not to be used for developing plans to assign pupils to overcome racial imbalance.[95] Similarly, Congress withheld authorizing the Attorney General, in school desegregation actions, to ask for a court order calling for busing pupils from one school to another to "achieve a racial balance".[96]

B. Section 407(a)(2) of Title IV authorizing the Attorney General to file suit to desegregate, contains the "anti-busing" proviso:

> ". . . nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial compliance with constitutional standards."

First, it should be noted that the prohibition applies only to transportation; and only to transportation across school lines to achieve racial balance. The furnishing of transportation as part of a freedom of choice plan is not prohibited. Second, the equitable powers of the courts exist independently of the Civil Rights Act of 1964. It is not contended in the instant cases that the Act conferred new authority on the courts. And this Court has not looked to the Act as a grant of new judicial authority.

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[94] For some idea of the number and complexity of the administrative problems school officials face in dealing with de facto segregation, see Kaplan, Segregation Litigation and the Schools—Part II: The General Northern Problem, 58 NW. U.L. Rev. 157, 182-186 (1963). Professor Kaplan quotes at length excerpts from the testimony in *Bell*.

[94a] The question of providing special, ear marked federal funds for school districts that were trying to correct imbalanced neighborhood schools came up again in connection with the 1966 amendments to the Elementary and Secondary Education Act of 1965. The House committee recommended special priority for applications under Title III of the Act from local school districts which sought help with problems of overcrowding, obsolescence, or racial imbalance. The House withdrew priority for dealing with problems of racial imbalance and added an amendment to Section 604 of the Act to the effect that nothing in the Act be construed to "require the assignment or transportation of students or teachers in order to overcome racial imbalance." The Senate went along with both actions. The debate makes clear that Congress was once again talking about racial imbalance in the context of de facto, not de jure, school segregation. See particularly Congressional Record, October 6, 1966, pp. 24538-9; 24541-3. See also 1966 U.S. Code Congressional and Administrative News, No. 11, pp. 5089-90, for language in House committee report recommending the priority position of applications to deal with racial imbalance.

[95] Congressman Cramer's amendment.

[96] This restriction appears in § 407 of the Act. In its context it seems clearly to restrict the Attorney General to requesting only such relief as is constitutionally compelled. In other words, the Act is *not* to be construed as authorizing a statutory duty to reduce imbalance by busing. Certainly the language of § 407 does not call for a construction that prohibits a court order directing the school boards abandon racially discriminatory practices which violate the Constitution. Nor does it suggest that the Attorney General is precluded from requesting court orders to end racial imbalance resulting from unconstitutional practices.

Section 407(a)(2) might be read as applying only to orders issued in suits filed by the Attorney General under Title IV. However, Senator, now Vice President Humphrey, Floor Manager in the Senate, said it was his understanding that the provision applied to the entire bill. In particular, he said that it applies to any refusal or termination of federal assistance under Title VI since the procedure for doing so requires an order approved by the President. Senator Humphrey explained:

> "This addition seeks simply to *preclude an inference that the title confers new authority to deal with 'racial imbalance' in schools*, and should serve to soothe fears that Title IV might be read to empower the Federal Government to order the bussing of children around a city in order to achieve a certain racial balance or mix in schools.' Furthermore, a new section 410 would explicitly declare that 'nothing in this title shall prohibit classification and assignment for reasons other than race, color, religion, or national origin.' Thus, clasification along *bona fide neighborhood school lines*, or *for any other legitimate reason* which local school boards might see fit to adopt, would not be affected by Title IV, so long as such classification was bona fide. Furthermore, this amendment makes clear that the only Federal intervention in local schools will be for the purpose of preventing denial of equal protection of the laws." (Emphasis added.)

Senator Humphrey spoke several times in the language of *Briggs* but his references to *Bell* indicate that the restrictions in the Act were pointed at the Gary, Indiana de facto type of segregation. Senator Byrd (West Virginia) asked Senator Humphrey would he give assurance "that under Title VI school children may not be bused from one end of the community to another end of the community at taxpayer' expense to relieve so-called racial imbalance in the schools". Senator Humphrey replied:

> "I do . . . That language is to be found in Title IV. The provision [§ 407(a)(2)] merely quotes the substance of a recent court decision which I have with me, and which I desire to include in the Record today, the so-called Gary case."

Senator Humphrey explained:

> "Judge Beamer's opinion in the *Gary* case is significant in this connection. In discussing this case, as we did many times, it was decided to write the *thrust of the court's opinion* into the proposed substitute." (Emphasis added.)

The thrust of the *Gary* case (*Bell*) was that if school districts were drawn without regard to race, but rather on the basis of such factors as density of population, travel distances, safety of the children, costs of operating the school system, and convenience to parents and children, those districts are valid even if there is a racial imbalance caused by discriminatory practices in housing. Thus, continuing his explanaton, Senator Humphrey said:

> "The bill does not attempt to integrate the schools, but it does attempt to eliminate segregation in the schools. The natural factors, such as density of population, and the distance that students would have to travel are considered legitimate means to determine the validity of a school district, *if the school districts are not gerrymandered, and in effect deliberately segregated*. The fact

> that there is a racial imbalance per se is not something which is unconstitutional. That is why we have attempted to clarify it with the language of Section 4." (Emphasis added.)

C. Section 601 states the general purpose of Title VI of the Act:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, *be denied the benefits of*, or be subjected to discrimination under any program or activity receiving Federal financial assistance." (Emphasis added.)

This is a clear congressional statement that racial discrimination against the beneficiaries of federal assistance is unlawful. Children attending schools which receive federal assistance are of course among the beneficiaries. In the House, Congressman Celler explained:

> "The legality is based on the general power of Congress to apply reasonable conditions . . . In general, it seems rather anomalous that the Federal Government should aid and abet discrimination on the basis of race, color or national origin by granting money and other kinds of financial aid. It seems rather shocking, moreover, that while we have on the one hand the 14th amendment, which is supposed to do away with discrimination since it provides for equal protection of the laws, on the other hand, we have the Federal Government aiding and abetting those who persist in practicing racial discrimination."

In the Senate, Senator Javits, an assistant floormanager, expressed concern as to the clarity of the statement of policy:

> "I ask the Senator whether we now have a clear understanding that if title IV shall be enacted as it is now proposed, the express and clear policy of Congress against aiding discrimination will prevail . . ."

Senator Humphrey answered:

> "Some Federal agencies appear to have been reluctant to act in this area. Title VI will require them to act. Its enactment will thus serve to insure uniformity and permanence to the nondiscrimination policy."

D. Section 604 of the Act, 42 U.S.C. § 2000d–3 is the section the defendants principally rely upon and the section most misunderstood.[27] It provides:

> "Nothing contained in this title shall be construed to authorize action under this title by any department or agency *with respect to any employment practice of any employer*, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment." (Emphasis added.)

The defendants contend that this section bars any action requiring desegregation of facilities and school personnel.

Section 604 was not a part of the original House bill. Senator Humphrey, while introducing the Act explained: "[The] Commissioner might also be justified in requiring elimination of racial discrimination in employment or assignment of teachers, at least where such discrimination affected the educational opportunities of students. See *Braxton v. Board of Public Instruction of Duval County*, 5 Cir. 1964, 326 F.2d 616." 110 Cong. Rec. p. 6545. That was in March 1964.

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[27] See Hearings Before the Committee on Rules, House of Representatives, 89 Cong. 2nd Sess., on H. Rep. 826, Sept. 29–30, 1966, 24–26, 37–40.

In June 1964, in explaining the amendments, Senator Humphrey said, "This provision is in line with the provisions of section 602[98] and serves to spell out more precisely the declared scope of coverage of the title." In the same speech he stated (110 C.R. 12714): "We have made no changes of substance in Title VI." This explanation plainly indicates that the amendment was not intended as a statutory bar to faculty integration in schools receiving federal aid.

However, in the interval between these two explanations the Attorney General, in response to a letter from Senator Cooper, stated that Section 602 would not apply to federally aided employers who discriminated in employment practices: "Title VI is limited . . . to discrimination against the beneficiaries of federal assistance programs. . . . Where, however, employees are the intended beneficiaries of a program, Title VI would apply".[99] He gave as an example accelerated public works programs. It was after the receipt of the Attorney General's letter that the amended Senate bill was passed. The school boards argue therefore that Section 604 was enacted, because of the Attorney General's interpretation, to exclude interference with employment practices of schools.

In its broadest application this argument would allow racial discrimination in the hiring, discharge, and assignment of teachers. In its narrowest application this argument would allow discrimination in hiring and discharging but not in assigning teachers, as inexplicable anomaly.[100] There is no merit to this argument. Section 604 and the Attorney General's letter are not inconsistent, since under Section 601 it is the school children, not the teachers (employees), who are the primary beneficiaries of federal assistance to public schools. Faculty integration is essential to student desegregation. To the extent that teacher discrimination jeopardizes the success of desegregation, it is unlawful wholly aside from its effect upon individual teachers.

After Section 601 was proposed, additional clarifying language was suggested to make it clear that discrimination in certain employer-employee relationships, not affecting the intended beneficiaries of the program, would be excluded from the reach of the statute. See Hearings, H.R. Com. on Rules, H.R. 7152, 88th Cong., 2d Sess. (1964), pp. 94, 226; 110 C.R. 6544–46 (Senator Humphrey). For example, there was a serious question as to whether the bill would forbid a farmer who was receiving benefits under the Agricultural Adjustment Act from discriminating upon the basis of race in the selection of his employees. Hearings, H.R. Comm. on Rules, H.R. 7152, 88 Cong., 2d Sess., 1964, p. 94, 110 C.R. 6545 (Senator Humphrey). The addition of Section 604 to the bill as originaly proposed clearly excluded the application of the Act to this type of situation. Congress did not, of course, intend to provide a forum for the relief of individual teachers who might be discriminatorily discharged: Congress was interested in a general requirement essential to success of the program as a whole.[101]

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[98] See footnote 19.

[99] BNA Operations Manual, The Civil Rights Act of 1964, p. 359.

[100] See Note, Desegregation of Public School Activities, 51 Iowa L. Rev. 681, 690–96 (1966).

[101] Senator Humphrey explained: The "elimination of racial discrimination in employment or assignment of teachers . . . does not mean that Title VI would authorize a federal official to prescribe [particular] pupil assignments, or to select a [particular] faculty as opponents of the bill have suggested. The only authority conferred would be authority to adopt, with the approval of the President, a general requirement that the local school authority refrain from racial discrimination in treatment of pupils and teachers . . ." 110 Cong. Rec. 6545.

Collaterally to their argument on Section 604, the defendants cite Section 701(b) of Title VII, covering Equal Employment Opportunities, which specifically excepts a "state or political subdivision thereof". This section has no application to schools. Section 701(b), defines "employer" as "a person engaged in an industry affecting commerce who has twenty-five or more employees. . . ."

Section 604 was never intended as a limitation on desegregation of schools. If the defendants' view of Section 604 were correct the purposes of the statute would be frustrated, for one of the keys to desegregation is integration of faculty. As long as a school has a Negro faculty it will always have a Negro student body. As the District Court for the Western District of Virginia put it in *Brown v. County School Board of Frederick County*, 1965, 245 F. Supp. 549, 560:

> "[T]he presence of all Negro teachers in a school attended solely by Negro pupils in the past denotes that school a 'colored school' just as certainly as if the words were printed across its entrance in six-inch letters."

As far as possible federal courts must carry out congressional policy. But we must not overlook the fact that "we deal here with constitutional rights and not with those established by statute".[102] The right of Negro students to be free from racial discrimination in the form of a segregated faculty is part of their broader right to equal educational opportunities. The "mandate of *Brown* . . . forbids the [discriminatory] consideration of race in faculty selection just as it forbids it in pupil placement." *Chambers v. Hendersonville City Board of Education*, 4 Cir. 1966, 364 F.2d 189.

In *Brown II* the Supreme Court specifically referred to the reallocation of staff as one of the reasons permitting desegregation "with all deliberate speed". "In determining the additional time necessary . . . courts may consider problems related to administration, arising from . . . *personnel*. . . ." (Emphasis added.) 349 U.S. at 301. For ten years, however, this Court and other circuit courts[103] had approved district courts' postponing hearings on faculty desegregation. *Bradley v. School Board of the City of Richmond*, 1965, 382 U. S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187 put an end to this practice. In *Bradley* the Supreme Court held that faculty segregation had a direct impact on desegregation plans. The court summarily remanded the case to the district court holding that it was improper for that court to approve a desegregation plan without considering, at a full evidentiary hearing, the impact of faculty allocation on a racial basis. The Court said, "[There is] no merit to the suggestion that relation between faculty allocation on an alleged racial basis and the adequacy of the desegregation plans are entirely speculative." Moreover, "Delays in desegregation of school systems are no longer tolerable." 382 U.S. at 105. In *Rogers v. Paul*, 1965, 382 U.S. 198, 200, 86 S.Ct. 358, 15 L.Ed.2d 265, the Supreme Court held that Negro students in grades not yet desegregated were entitled to an immediate transfer to a white high school. They "plainly had standing" to sue on two theories: (1) "that *racial allocation of faculty denies them equality of educational opportunity*

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[102] Smith v. Board of Education of Morrilton, 8 Cir. 1966, 365 F.2d 770, 784.

[103] For example, Lockett v. Board of Education of Muscogee County, 5 Cir. 1965, 342 F.2d 225, 229; Calhoun v. Latimer, 5 Cir. 1963, 321 F.2d 302, 307; Bradley v. School Board of the City of Richmond, 4 Cir. 1965, 345 F.2d 310, 320.

without regard to segregation of pupils, and (2) that it renders inadequate an otherwise constitutional pupil desegregation plan soon to be applied to their grades." In *Singleton II* this Court, relying on *Bradley*, held that it was "essential" for the Jackson schools to make an "adequate start toward elimination of race as a basis for the employment and allocation of teachers, administrators and other personnel." 355 F.2d at 870.

In a recent decision of the Eighth Circuit, *Clark v. Board of Education of Little Rock School District*, No. 18,368, December 15, 1966, the Court required a "positive program aimed at ending in the near future the segregation of the teaching and operating staff". The Court stated: "We agree that faculty segregation encourages pupil segregation and is detrimental to achieving a constitutionally required non-racially operated school system. It is clear that the Board may not continue to operate a segregated teaching staff. . . . It is also clear that the time for delay is past. The desegregation of the teaching staff should have begun many years ago. A this point the Board is going to have to take accelerated and positive action to end discriminatory practices in staff assignment and recruitment."

In *Braxton v. Board of Public Instruction of Duval County*, 1964, 326 F.2d 616, 620, *cert. denied* 377 U.S. 924, the case cited by Senator Humphrey, this Court affirmed an order of the district court prohibiting assignment of "teachers *and other personnel* . . . on a racially segregated basis." In *Smith v. Board of Education of Morrilton*, 8 Cir. 1966, 365 F.2d 770, 778, the Court said:

> "It is our firm conclusion that the reach of the Brown decisions, although they specifically concerned only pupil discrimination, clearly extends to the proscription of the employment and assignment of public school teachers on a racial basis. Cf. United Public Workers v. Mitchell, 330 U. S. 75, 100 (1947); Wieman v. Updegraff, 344 U. S. 183, 191–192 (1952). See Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U. S. 714, 721 (1963). This is particularly evident from the Supreme Court's positive indications that nondiscriminatory allocation of faculty is indispensable to the validity of a desegregation plan. Bradley v. School Board of the City of Richmond, supra; Rogers v. Paul, supra. This court has already said, 'Such discrimination [failure to integrate the teaching staff] is proscribed by *Brown* and also the Civil Rights Act of 1964 and the regulations promulgated thereunder'. Kemp v. Beasley, supra, p. 22 of 352 F.2d."

In *Wheeler v. Durham City Board of Education*, 4 Cir. 1966, 363 F.2d 738, 740 the Court stated: "We read [*Bradley*] as authority for the proposition that removal of race considerations from faculty selection and allocation is, as a matter of law, an inseparable and indispensable command within the abolition of pupil segregation in public schools as pronounced in *Brown v. Board of Education*, 347 U.S. 483. Hence no proof of the relationship of faculty allocation and pupil assignment was required here. The only factual issue is whether race was a factor entering into the employment and placement of teachers." In *Wright v. County School Board of Greensville County*, E.D. Va. 1966, 252 F. Supp. 378, 384, holding that a faculty desegregation provision approved by the Commissioner of Education was not sufficient, the court said:

> "The primarily responsibility for the selection of means to achieve employment and assignment of staff on a nonracial basis rests with the school board. . . . Several principles must be observed by the board. Token assignments will not suffice. The elimination of a racial basis for the employment and assignment of staff must be achieved at the earliest practicable date. The plan must contain well defined procedures which will be put into effect on definite dates. The board will be allowed ninety days to submit amendments to its plan dealing with staff employment and assignment practices."

In *Kier v. County School Board of Augusta County*, W.D. Va. 1966, 249 F. Supp. 239, 247, the court held that free choice plans require faculty integration:

> "Freedom of choice, in other words, does not mean a choice between a clearly delineated 'Negro school' (having an all-Negro faculty and staff) and a 'white school' (with all-white faculty and staff). School authorities who have heretofore operated dual school systems for Negroes and whites must assume the duty of eliminating the effects of dualism before a freedom of choice plan can be superimposed upon the pre-existing situation and approved as a final plan of desegregation. It is not enough to open the previously all-white schools to Negro students who desire to go there while all-Negro schools continue to be maintained as such. . . . The duty rests with the School Board to overcome the discrimination of the past, and the long-established image of the 'Negro school' can be overcome under freedom of choice only by the presence of an integrated faculty."

See also *Dowell v. School Board of Oklahoma City Public Schools*, W.D. Okla. 1965, 244 F. Supp. 971, 977, and *Franklin v. County School Board of Giles County*, 4 Cir. 1966, 360 F.2d 325.

We cannot impute to Congress an intention to repudiate Senator Humphrey's explanation of Section 604 and to change the substance of Title VI, tearing the vitals from the statutory objective. Integration of faculty is indispensable to the success of desegregation plan. Nor can we impute to Congress the intention to license, unconstitutionally, discrimination in the employment and assignment of teachers, a conspicuous badge of de jure segregated schools.[104]

E. As we construe the Act and its legislative history, epsecially the sponsors' reliance on *Bell*, Congress, because of its hands-off attitude on bona fide neighborhood school ssytems, qualified its broad policy of nondiscrimination by precluding HEW's requiring the bussing of children across district lines or requiring compulsory placement of children in schools to strike a balance when the imbalance results from de facto, that is, non-racially motivated segregation. As Congressman Cramer said, "De facto segregation is racial imbalance". But *there is*

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[104] Chambers v. Hendersonville City Board of Education, 4 Cir. 1966, 364 F.2d 189, 192, involved the problem of surplus Negro teachers who lost their jobs when an all Negro school was abolished. The School Board treated them as new applicants. The court held that this was discriminatory. Speaking for the majority, Judge Bell said: "First, the mandate of Brown v. Board of Education, 347 U.S. 483 (1954), forbids the consideration of race in faculty selection just as it forbids it in pupil placement. See Wheeler v. Durham City Board of Education, 346 F.2d 768, 773 (4 Cir. 1965). Thus the reduction in the number of Negro pupils did not justify a corresponding reduction in the number of Negro teachers. Franklin v. County Board of Giles County, 360 F.2d 325 (4 Cir. 1966). Second, the Negro school teachers were public employees who could not be discriminated against on account of their race with respect to their retention in the system. Johnson v. Branch, 364 F.2d 177, (4 Cir. 1966). . . ."

nothing in the language of the Act or in the legislative history that equates corrective acts to desegregate or to integrate a dual school system initially based on de jure segregation with acts to bring about a racial balance in a system based on bona fide neighborhood schools.

Congress recognized that HEW's requirements for qualifying for financial assistance are one thing and the courts' constitutional and judicial responsibilities are something else again. The Act states, therefore, that it did not enlarge the courts' existing powers to ensure compliance with constitutional standards. *But neither did it reduce the courts' power.*

V.

The HEW Guidelines agree with decisions of this circuit and of the similarly situated Fourth and Eighth Circuits. And *they stay within the Congressional mandate*. There is no cross-district or cross-town bussing requirement. There is no provision requiring school authorities to place white children in Negro schools or Negro children in white schools for the purpose of striking a racial balance in a school or school district proportionate to the racial population of the community or school district.[105] The provision referring to percentages is a general rule of thumb or objective administrative guide for measuring progress in desegregation rather than a firm requirement that must be met.[106] See footnotes 105 and 106. Good faith in compliance should be measured by performance, not promises.

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[105] The present Commissioner of Education, Harold Howe II, in a congressional hearing declared:

> "The guidelines do not mention and do not require 'racial balance' or the correction of racial 'imbalance.' Nor have we in the administration of our obligations under Title VI sought to establish 'racial balance.' They deal only with desegregation plans designed to eliminate the dual school systems for whites and Negroes, systems being operated in violation of the 1954 Supreme Court ruling. . . . Racial imbalance certainly means the notion of trying to establish some proportion of youngsters that must be in each and every school. We are not about such an enterprise. We are trying to give the effect of free choices to enter into, or to allow free choices in having pupils enter into whatever school they may wish to attend. I do not believe that free choice plans were ever intended by the courts or by us to be an arrangement whereby the dual school system could continue without support of law. But rather an arrangement by which over a period of time we would gradually have one school system rather than two separate school systems. I do not see that we are engaged in any way in establishing procedures for balance." Hearings before the Committee on Rules, House of Representatives, 89th Cong. 2nd Sess., on H. Res. 26, Sept. 29 30, 1966, p. 32 34.

See also footnote 106.

[106] In a letter addressed to Members of Congress and Governors, dated April 9, 1966, and given wide publicity in the press, John W. Gardner, Secretary of Health, Education and Welfare explained the purpose of the percentages:

> "The second area of concern involves the percentages mentioned in the guidelines. Some have contended that this portion of the guidelines imposes a formula of 'racial balance.' This contention misconceives the purpose of the percentages. The prevailing method of desegregation is what is called the 'free choice' plan. Under such a plan, students select their schools instead of being assigned to them on a geographic basis. Courts have expressly conditioned their approval of such plans on affirmative action by school boards to insure that 'free choice' actually exists. It is our responsibility to review such plans to insure that the choice is, in fact, free and to indicate to school districts what procedures should be used to assure true freedom of choice.
>
> In seeking appropriate criteria to guide us in review of free choice plans, we have adopted the objective criteria applied by the courts in similar situations. One such criterion is the distribution of students by race in the various schools of a system after the students have made their choices. If substantial numbers of Negro children choose and go to previously all white schools, the choice system is clearly operating freely. If few or none choose to do so in a community where there has been a pattern of segregation, then it is appropriate that the free choice plan be reviewed and other factors considered to determine whether the system is operating freely.
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> *With more than 2000 separate districts to consider, such percentages are thus an administrative guide which helps us to determine those districts requiring further review. Such review in turn will determine whether or not the freedom of choice plan is 'in fact working fairly.'"* New York Times, April 12, 1966, page 1.

Printed in Hearings before the Committee on Rules, House of Representatives, 89 Cong. 2d Sess., on H. Res. 826, Sept. 29-30, 1966, p. 31. Commissioner Howe reaffirmed Secretary Gardner's policies as stated in the letter. See Hearings on H. Res. 826, p. 30–33.

In reviewing the effectiveness of an approved plan it seems reasonable to use some sort of yardstick or objective percentage guide. The percentage requirements in the Guidelines are modest, suggesting only that systems using free choice plans for at least two years should expect 15 to 18 per cent of the pupil population to have selected desegregated schools. This Court has frequently relied on percentages in jury exclusion cases. Where the percentage of Negroes on the jury and jury venires is disproportionately low compared with the Negro population of a county, a prima facie case is made for deliberate discrimination against Negroes.[107] Percentages have been used in other civil rights cases.[108] A similar inference may be drawn in school desegregation cases, when the number of Negroes attending school with white children is manifestly out of line with the ratio of Negro school children to white school children in public schools. Common sense suggests that a gross discrepancy between the ratio of Negroes to white children in a school and the HEW percentage guides raises an inference that the school plan is not working as it should in providing a unitary, integrated system. Thus *Evans v. Buchanan*, D.C. Del. 1962, 207 F. Supp. 820[109] held that this natural inference coupled with the board's possessing the probative facts that might rebut the inference created a presumption that the proposed desegregation plan was unconstitutional.

The Guidelines were adopted for the entire country. However, they have been formulated in a context sympathetic with local problems. Sections 403-405 of the 1964 Civil Rights Act provide that, upon request, the Commissioner of Education may render technical assistance to public school systems engaged in desegregation. The Commissioner may also establish training institutes to counsel school personnel having educational problems occasioned by desegregation; and the Commissioner may make grants to school boards to defray the costs of providing in-service training on desegregation. In short, the Commissioner may assist those school boards who allege that they will have difficulty complying with the guidelines. When desegregation plans do not meet minimum standards, the school authorities should ask HEW for assistance. And district courts should invite HEW to assist by giving advice on raising the levels of the plans and by helping to coordinate a school's promises with the school's performance. In view of the competent assistance HEW may furnish schools, there is a heavy burden on proponents of the argument that their schools cannot meet HEW standards.

VI.

School authorities in this circuit, with few exceptions, have turned to the "freedom of choice" method for desegregating public schools. The method has serious shortcomings. Indeed, the "slow pace of integration in the Southern and border States is in large measure attributable to the manner in which free choice plans . . . have operated."[110] When such plans leave school officials with a broad area of uncontrolled discretion, this method of desegregation is better suited than any other to preserve the essentials of the dual school system while giving paper compliance with the duty to desegregate.

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[107] "Very decided variations in proportions of Negroes and whites on jury lists from racial proportions in the population, which variations are not explained and are long continued, furnished evidence of systematic exclusion of Negroes from jury service." United States ex rel. Seals v. Wilman, 5 Cir. 1962, 304 F.2d 53, 67.

[108] In United States v. Ward, supra at 803, the Court compared the number of Negroes registered with the number of Negroes eligible to vote. A similar practice is used in proving systematic exclusion of Negroes from juries. Cassell v. Texas, 1950, 339 U.S. 282; Avery v. Georgia, 1953, 345 U.S. 559; Smith v. Texas, 1940, 311 U.S. 128. In each instance, precentage tests have been used not as an effort to effect racial balance, but as a means of determining whether a challenged procedure is operating in a way that violates constitutional rights. See Finkelstein, The Application of Statistical Decision Theory to the Jury Discrimination Cases, 80 Harv. L. Rev. 338 (1966).

[109] See footnote 58.

A free choice plan does not abandon geographical criteria, but requires no rigid adherence to attendance zones. Theoretically every child may choose his school, but its effectiveness depends on the availability of open places in balanced schools. Moreover, unless there is some provision to prevent white children transferring out of an imbalanced school this plan will promote resegregation.[111]

"Under freedom of choice plans, schools tend to retain their racial identification."[112] Such plans require affirmative action by parents and pupils to disestablish the existing system of public schools. In this circuit white students rarely choose to attend schools identified as Negro schools. Negro students who choose white schools are, as we know from many cases, only Negroes of exceptional initiative and fortitude. New construction and improvements to the Negro school plant attract no white students and diminish Negro motivation to ask for transfer. Nevertheless, the Eighth Circuit has approved freedom of choice plans "as a permissible method at this stage," although recognizing that such a plan "is still only in the experimental stage and it has not yet been demonstrated that such a method will fully implement the decision of *Brown* and subsequent cases and the legislative declaration of § 2000(d) of the Civil Rights Act of 1964."[113] We have said: "At this stage in the history of desegregation in the deep South a 'freedom of choice plan' is an acceptable method for a school board to use in fulfilling its duty to integrate the school system. In the long run, it is hardly possible that schools will be administered on any such haphazard basis". *Singleton II*, 355 F.2d at 71. HEW recognizes freedom of choice as a permissible means of desegregation. See Revised Guidelines, Subpart B, 181.11, and all of Subpart D.

Courts should closely scrutinize all such plans. Freedom of choice plans "may . . . be invalid because the 'freedom of choice' is illusory.

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[110] Rep. U.S. Comm. on Civil Rights, Survey of School Desegregation in the Southern and Border States—1965–66, p. 51. "Freedom of choice plans accepted by the Office of Education have not disestablished the dual and racially segregated school systems involved, for the following reasons: a. Negro and white schools have tended to retain their racial identity; b. White students rarely elect to attend Negro schools; c. Some Negro students are reluctant to sever normal school ties, made stronger by the racial identification of their schools; d. Many Negro children and parents in Southern States, having lived for decades in positions of subservience, are reluctant to assert their rights; e. Negro children and parents in Southern States frequently will not choose a formerly all-white school because they fear retaliation and hostility from the white community; f. In some school districts in the South, school officials have failed to prevent or punish harassment by white children of Negro children who have elected to attend white schools; g. In some areas in the South where Negroes have elected to attend formerly all-white schools, the Negro community has been subjected to retaliatory violence, evictions, loss of jobs, and other forms of intimidation." Ibid.

[111] See Goss v. Board of Education, 1963, 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632; Dillard v. School Board of the City of Charlottesville, 4 Cir. 1962, 308 F.2d 920, cert. den'd 374 U.S. 827 (1963); Jackson v. School Board of the City of Lynchburg, 4 Cir. 1963, 321 F.2d 230. For discussion of limitations to a free choice plan, see Fiss, Racial Imbalance in the Public Schools, 78 Harv. L. Rev. 563, 572 (1965).

[112] Rep. U.S. Comm. on Civ. Rights, Survey of Desegregation in the Southern and Border States, 1965–66, p. 33. The Commission also notes that racial identification of schools as Negro schools is strengthened by: (1) normal school ties; (2) the interest Negro administrators and teachers have in maintaining the dual system (from May 1965 to September 1965, 668 Negro teachers became surplus because of desegregation); (3) some Negro educators are opposed to desegregation, because past economic and cultural deprivation makes Negroes ill prepared to compete with white children in schools.

[113] Kemp v. Beasley, 8 Cir. 1965, 352 F.2d 14, 21.

The plan must be tested not only by its provisions, but by the manner in which it operates to provide opportunities for a desegregated education." *Wright v. County School Board of Greenville County*, E.D.Va. 1966, 252 F.Supp. 378, 383. In that case the court was concerned that "operation under the plan may show that the transportation policy or the capacity of the schools severely limits freedom of choice, although provisions concerning these phases are valid on their face". In *Lockett v. Board of Education of Muskogee County, Ga.*, 5 Cir. 1965, 342 F.2d 225, we were concerned that "proper notice" be given so that "Negro students are afforded a reasonable and conscious opportunity to apply for admission to any school which they are otherwise eligible to attend without regard to race". Also, as Judge Bell, for the Court, pointed out, "a necessary part of the plan is a provision that the dual or biracial school attendance system . . . be abolished." See also *Dowell* v. *School Board of Oklahoma City Public Schools*, W.D.Okla. 1965, 244 F. Supp. 971; *Bell v. School Board of City of Staunton*, W.D.Va. 1966, 249 F.Supp. 249; *Kier v. County School Board of Augusta County* W.D. Va. 1966, 249 F. Supp. 239.

There is much that school authorities should do to meet their responsibilities:

> "[*Brown*] called for responsible public officials to reappraise their thinking and policies, and to make every effort to afford Negroes the more meaningful equality guaranteed them by the Constitution. The Brown decision, in short, was a lesson in democracy, directed to the public at large and more particularly to those responsible for the operation of the schools. It imposed a legal and moral obligation upon officials who had created or maintained segregated schools to undo the damage which they had fostered." *Taylor* v. *Board of Education of the City of New Rochelle*, S.D.N.Y. 1961, 191 F. Supp. 181, 187, aff'd 294 F. 2d 36, cert. den'd 368 U.S. 940 (1961).

School officials should consult with Negro and white school authorities before plans are put in final form. They should see that notices of plans and procedures are clear and timely. They should avoid the discriminatory use of tests and the use of birth and health certificates to make transfers difficult. They should eliminate inconvenient or burdensome arrangements for transfer, such as requiring the personal appearance of parents, or making forms available at inconvenient times to working people. They should employ forms which do not designate the name of a Negro school as the choice or contain a "waiver" of the "right" to attend white schools. Certainly school officials should not discourage Negro children from enrolling in white schools, directly or indirectly, as for example, by advising them that they would not be permitted to engage or would not want to engage in school activities, athletics, the band, clubs, school plays. If transportation is provided for white children, the schedules should be re-routed to provide for Negro children. Overcrowding should not be used as an excuse to avoid transfers of Negro children. In *Bradley v. School Board of the City of Richmond*, 4 Cir. 1965, 345 F.2d 310, 323, Judges Sobeloff and Bell, concurring, said:

> "A plan of desegregation is more than a matter of words. The attitude and purpose of public officials, school administrators and

> faculties are an integral part of any plan and determine its effectiveness more than the words employed. If these public agents translate their duty into affirmative and sympathetic action the plan will work; if their spirit is obstructive, or at least negative, little progress will be made, no matter what form of words may be used."

Freedom of choice means the maximum amount of freedom and clearly understood choice in a bona fide unitary system where schools are not white schools or Negro schools—just schools.

We turn now to a discussion of the specific elements of a freedom of choice plan that make it more than a mere word of promise to the ear.

A. *Speed of Desegregation.* The announced speed of desegregation no longer seems to be a critical issue. The school boards generally concede that by the school year 1967–68 *all* grades should be desegregated.

B. *Mandatory Annual Free Choice.* Underlying and tending to counteract the effectiveness of all the freedom of choice plans before the Court is the initial unconstitutional assignment of all students by race. When the freedom of choice plan is "permissive" or "voluntary" the effect is to superimpose the same old transfer plan on racial assignments and dual zones. We hold that any freedom of choice plan is inadequate if based upon a preliminary system of assignment by race or dual geographic zones. See *Singleton II* and *Lockett v. Board of Education of Muscogee County, Ga.*, 5 Cir. 1965, 342 F.2d 225, restating the requirement of *Stell v. Savannah-Chatham County Board of Education*, 5 Cir. 1964, 333 F.2d 55 and *Gaines v. Dougherty County Board of Education*, 5 Cir. 1964, 334 F.2d 983. It is essential that dual or biracial school attendance systems be abolished contemporaneously with the application of a plan to the respective grades reached by it.

In place of permissive freedom of choice there must be a mandatory annual free choice of schools by all students, both white and Negro. "If a child or his parent is to be given a meaningful choice, this choice must be afforded annually." *Kemp v. Beasley*, 8 Cir. 1965, 352 F.2d 14, 22. The initial choice of assignment, within space limitations, should be made by a parent or by a child over fifteen without regard to race. This mandatory free choice system would govern even the initial assignment of students to the first grade and to kindergarten. At the minimum, a freedom of choice plan should provide that: (1) *all* students in desegregated grades shall have an opportunity to exercise a choice of schools. *Bradley v. School Board of the City of Richmond*, 4 Cir. 1965, 345 F.2d 310, vacated and remanded, 1965, 382 U.S. 103; (2) where the number of applicants applying to a school exceeds available space, preferences will be determined by a uniform non-racial standard, *Stell v. Savannah-Chatham County Board of Education*, 5 Cir. 1964, 333 F.2d 55, 65; and (3) when a student fails to exercise his choice, he will be assigned to a school under a uniform non-racial standard, *Kemp v. Beasley*, 8 Cir. 1965, 352 F.2d 14, 22.

C. *Notice.* The notice provisions of the HEW Guidelines are reasonable and should be followed. Where public notice by publication in a newspaper will assure adequate notice, individual notice will not be necessary. Individual notice should be required if notice by publication is likely to be inadequate.

D. *Transfers for Students in Non-desegregated Grades and with Special Needs.* In *Singleton II* we held that children in still-segregated grades in Negro schools "have an absolute right, as individuals, to transfer to schools from which they were excluded because of their race." [114] 335 F.2d at 869. See also *Rogers v. Paul*, 1965, 382 U.S. 198, 15 L.Ed.2d 265. A transfer provision should be included in the plan. The right to transfer under a state Pupil Placement Law should be regarded as an additional right that takes into consideration criteria irrelevant to the absolute right referred to in *Rogers v. Paul.*

E. *Services, Facilities, Activities, and Programs.* In *Singleton II* we held that there should be no segregation or discrimination in services, facilities, activities, and programs that may be conducted or sponsored by, or affiliated with, the school in which a student is enrolled. We have in mind school athletics and inter-schlastic associations of course, but also parents-teachers associations. In order to eliminate any uncertainty on this point, we hold that the plan should contain a statement that there will be no such segregation or discrimination.

F. *School Equalization.* In recent years, as we are all well aware, Southern states have exerted great effort to improve Negro school plants. There are however many old and inferior schools readily identifiable as Negro schools; there are also many superior white schools, in terms of the quality of instruction. A freedom of choice plan will be ineffective if the students cannot choose among schools that are substantially equal. A school plan therefore should provide for closing inferior schools and should also include a provision for remedial programs to overcome past inadequacies of all-Negro schools. This will, of course, require the local school authorities and the trial courts to examine carefully local situations and perhaps seek advice from qualified, unbiased authorities in the field.

G. *Scheduled Compliance Reports.* Scheduled compliance reports to the court on the progress of freedom of choice plans are a necessity and of benefit to all the parties. These should be required following the choice period and again after the opening of school. None of the school boards expressly objected to this provision, or one similar to it, and it does not appear onerous.

H. *Desegregation of Faculty and Staff.* The most difficult problem in the desegregation process is the integration of faculties. See Section IV D of this opinion. A recent survey shows that until the 1966–67 session not a single Negro teacher in Alabama, Louisiana, or Mississippi has been assigned to a school where there are white teachers.[115] As evidenced in numerous records, this long continued policy has resulted in inferior Negro teaching and in inferior education of Negroes as a class. Everyone agrees, on principle, that the selection and assignment of teachers on merit should not be sacrificed just for the sake of integrating faculties: teaching is an art. Yet until school authorities recognize and carry out their affirmative duty to integrate faculties as well as facilities, there is not the slightest possibility of their ever establishing an operative non-discriminatory school system.[116] The transfer of a few Negro children to a white school does not do away with the dual system. A Negro faculty makes a Negro school; the Negro school contineus to offer inferior educational opportunities; and the school system continues its psychological harm to Negroes as a class by not putting them on an equal level with white children as a class.[117] To prevent such harm or to undo the harm, or to prevent resegregation, the school authorities, even in the administration of an otherwise rational, nondiscriminatory policy, should take corrective action involving racial criteria. As we pointed out (see Section III C), in fashioning an appropriate remedy tending to undo past discrimination this Court has often taken race into account.

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[114] This was not new. In 1957 a district court in Maryland held that stair step plans do not justify excluding a qualified individual, notwithstanding a more gradual schedule applicable to the school population generally. Moore v. Board of Education of Harford County, D.Md. 1957, 146 F. Supp. 91 and 152 F.Supp. 114, aff'd sub.nom. Slade v. Board of Education, 4 Cir. 1958, 252 F.2d 191, cert. den'd 357 U.S. 906 (1958). This Court approved such an order in Augustus v. Board of Education, 5 Cir. 1962, 306 F.2d 863.

[115] See footnote 35. However, the press has carried accounts that progress is being made toward "desegregation of teachers, administrators and other personnel" for 1967–68 in Jackson, Mississippi. See Jackson Clarion Ledger, July 30, 1966, page 1.

In the past year, district courts have struggled with the problem of framing effective orders for the desegregation of faculty. (1) Some courts have focused upon the specific results to be reached by reassignment of teachers previously assigned solely upon the basis of their race. *Dowell v. School Board of Oklahoma City Public Schools*, W.D.Okla. 1965, 244 F. Supp. 971, *Kier v. County School Board of Augusta County*, W.D. Va. 1966, 249 F. Supp. 239.[118] The orders entered in these cases require the defendant school boards to assign any newly employed teachers and reassign already-employed faculty so that the proportion of each race assigned to teach in each school will be the same as the proportion of teachers of that race in the total teaching staff in the system, or at least, of the particular school level in which they are employed. (2) Other courts have not been specific as to the number of teachers of each race that should be assigned to each school in order to remove the effects of past discriminatory assignments. These courts have focused upon the mechanics to be followed in removing the effect of past discrimination rather than upon the result as such. Thus, in *Beckett v. School Board of the City of Norfolk*, Civil Action No. 2214 (E.D. Va., 1966); *Gilliam v. School Board of the City of Hopewell*, Civil Action No. 3554 (E.D. Va. 1966); and *Bradley v. School Board of the City of Richmond*, Civil Action No. 3353 (E.D. Va. 1966), the courts approved consent decrees setting forth in detail the considerations that would control the school administrators in filling faculty vacancies and in transferring already-employed faculty members in order to facilitate faculty integration. (3) In a third group of cases, the district court, while emphasizing the necessity of affirmative steps to undo the effects of past racial assignments of faculty and while requiring some tangible results, has not been specific regarding the mechanics or the specific results to be achieved. See *Harris v. Bullock County Board of Education*, M.D. Ala. 1966, 253 F. Supp. 276; *United States v. Lowndes Board of Education*, Civil Action No. 2328-

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[116] "Faculty desegregation is a necessary precondition of an acceptable free choice plan. A free choice plan cannot disestablish the dual school system where facultaies remain segregated on the basis of the race of the teachers or the pupils. In such circumstances a school inevitably will remain identified as "white" and "Negro" depending on the color of the teachers." Rep., U.S. Comm. on Civil Rights, Survey of Desegregation in the Southern and Border States—1965–66, p. 57.

[117] Faculties should be desegregated so that "both white and Negro students would feel that their color was represented upon an equal level and that their people were sharing the responsibility of high-level teaching. Dowell v. School Board of Oklahoma City Public Schools, W.D. Okla. 1965, 219 F. Supp. 427.

[118] In *Kier* the Court said that duty to desegregate faculty must be "immediately and squarely met": there can be no freedom of choice for faculties and administrative staffs by the 1966–67 school year. Insofar as possible, "the percentage of Negro teachers in each school of the system should approximate the percentage of Negro teachers in the entire system for the 1965–66 season". 249 F. Supp. at 22.

N (M.D. Ala. 1966); *Carr v. Montgomery County Board of Education*, M.D. Ala. 1966, 253 F. Supp. 306.

We agree with the Eighth Circuit's statement: "The lack of a definite program will only result in further delay of long overdue action. We are not content at this late date to approve a desegregation plan that contains only a statement of general good intention. We deem a positive commitment to a reasonable program aimed at ending segregation of the teaching staff to be necessary for the final approval of a constitutionally adequate desegregation plan." *Clark v. Board of Education of the Little Rock School District*, No. 18,368, December 15, 1966 (unreported). In that case the Court did not impose "a set time with fixed mathematical requirements". However the Court was firm in its position: "First, as the Board has already positively pledged, future employment, assignment, transfer, and discharge of teachers must be free from racial consideration. Two, should the desegregation process cause the closing of schools employing individuals predominately of one race, the displaced personnel should, at the very minimum, be absorbed into vacancies appearing in the system. *Smith v. Board of Education of Morrilton, supra.* Third, whenever possible, requests of individual staff members to transfer into minority situations should be honored by the Board. Finally, we believe the Board should make all additional positive commitments necessary to bring about some measure of racial balance in the staffs of the individual schools in the very near future. The age old distinction of 'white schools' and 'Negro schools' must be erased. The continuation of such distinctions only perpetrates inequality of educational opportunity and places in jeopardy the effective future operation of the entire 'freedom of choice' type plan."

In *Singleton I* we agreed with the original HEW Guidelines in requiring that an "adequate start" toward faculty desegregation should be made in 1966–67. The requirement that all grades be desegregated in 1967–68 increases the need for substantial progress beyond an "adequate start". It is essential that school officials (1) cease practicing racial discrimination in the hiring and assignment of *new* faculty members and (2) take affirmative programmatic steps to correct existing effects of past racial assignment. If these two requirements are prescribed, the district court should be able to add specifics to meet the particular situation the case presents. The goal should be an equitable distribution of the better teachers.[119] We anticipate that when district courts and this Court have gained more experience with faculty integration, the Court will be able to set forth standards more specifically than they are set forth in the decrees in the instant cases.

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[119] Rev. Theodore M. Hesburgh, President of Notre Dame and a member of the Civil Rights Commission, makes these suggestions: "A realistic and quite possible approach to this is, I think, through the immediate improvement of all teachers of each race, beginning with those who most need assistance in being better qualified as teachers. * At this precise time of transition, why not institute along with the whole process of desegregation in the South a positive program of upgrading all teachers in the present systems? In fact, the best teachers of either race, worthy of their profession, should be put in the schools needing the most help to improve. One might even think of rotating teachers within the schools of a given district. There is already the existing pattern of academic year and summer institutes for just this purpose of improving teachers. . . . * If this positive action could be moved along quickly, with good will from all concerned, school administrators, parents, and students, then we could eliminate the present cat-and-mouse game which is going on between the Federal Office of Education and the local Southern school districts. In fact, I have a feeling that the South could solve its problem long before the North, which has an educational desegregation problem which may be less amenable to solution because of entrenchment patterns of housing segregation." Rep., U.S. Comm. on Civil Rights, Survey of Desegregation in the Southern and Border States—1965–66, p. 34.

VII.

We attach a decree to be entered by the district courts in these cases consolidated on appeal. (See Appendix A.)

We have carefully examined each of the records in these cases. In each instance the record supports the decree. However, the provisions of the decree are intended, as far as possible, to apply uniformly throughout this circuit in cases involving plans based on free choice of schools. School boards, private plaintiffs, and the United States may, of course, come into court to prove that exceptional circumstances compel modification of the decree. For example, school systems in areas which let school out during planting and harvesting seasons may find that the period for exercise of choice of schools, March 1–31, should be changed to a different month.

As *Brown* dictates, the decree places responsibility on the school authorities to take affirmative action to bring about a unitary, nonracial system. As the Constitution dictates, the proof of the pudding is in the eating: the proof of a school board's compliance with constitutional standards is the result—the performance. Has the operation of the promised plan actually eliminated segregated and token-desegregated schools and achieved substantial integration?

The substantive requirements of the decree derive from the Fourteenth Amendment as interpreted by decisions of the Supreme Court and of this Court, in many instances before the HEW Guidelines were published. For administrative details, we have looked to the Office of Education. For example, those familiar with the HEW Guidelines will note that the decree follows the Guidelines exactly as to the form letters which go to parents announcing the need to exercise a choice of schools, and the forms for exercising that choice are the same. Indeed a close parallel will be noted between much in Parts II through V of the decree and the Guideline provisions.

The great bulk of the school districts in this circuit have applied for Federal financial assistance and therefore operate under voluntary desegregation plans.[120] Approval of these plans by the Office of Education qualifies the schools for federal aid. In this opinion we have held that the HEW Guidelines now in effect are constitutional and are within the statutory authority created in the Civil Rights Act of 1964. Schools therefore, in compliance with the Guidelines can in general be regarded as discharging constitutional obligations.

Some schools have made no move to desegregate or have had plans rejected as unsatisfactory by district courts or the HEW. We expect the provisions of the decree to be applied in proceedings involving such schools. Other schools have earlier court-approved plans which fall short of the terms of the decree. On motion by proper parties to reopen these cases, we expect these plans to be modified to conform with our decree. In some cases the parties may challenge various aspects of HEW-approved plans. Our approval of the existing Guidelines and the difference owed to any future Guidelines is not intended to deny a day in court to any person asserting individual rights or to any school board contesting HEW action.[121] In any school desegregation case the issue concerns the constitutional rights of Negroes, individually and as a class, and the constitutional rights of the State—not the issue whether federal financial assistance should be withheld under Title VI of the Civil Rights Act of 1964.

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[120] "Although only 164 (3.4 percent) of the 4,941 school districts in the South have qualified by the court order route, these districts include most of the major cities of the South and, accordingly, a large share of the population. Court orders are a significant method of qualification particularly in Louisiana, where official resistance to compliance with Title VI has been most widespread. In Louisiana, 32 court orders have been accepted, affecting 86.5 percent of the school districts judged qualified." 1966—U.S. Comm. on Civ. Rights, Survey of School Desegregation in the Southern and Border States 46. See also Table 3 in Appendix B.

When school systems are under court-ordered desegregation, the courts are responsible for determining the sufficiency of the system's compliance with the decree. The court's task, therefore, is a continuing process, especially in major areas readily susceptible of observation and measurement, such as faculty integration and student desegregation. (1) As to faculty, we have found that school authorities have an affirmative duty to break up the historical pattern of segregated faculties, the hall-mark of the dual system. To aid the courts in its task, the decree requires the school authorities to report to the district courts the progress made toward faculty integration. The school authorities bear the burden of justifying an apparent lack of progress.[122] (2) As to students, the decree requires school authorities to make reports to the court showing by race, by school, by grade, the choices made in each "choice period". A similar report is required after schools open to show what actually happened when schools opened.

What the decree contemplates, then, is continuing judicial evaluation of compliance by measuring the performance—not merely the promised performance—of school boards in carrying out their constitutional obligation "to disestablish dual, racially segregated school systems and to achieve substantial integration within such systems."[123] District courts may call upon HEW for assistance in determining whether a school board's performance measures up to its obligation to desegregate. If school officials in any district should find that their district still has segregated faculties and schools or only token integration, their affirmative duty to take corrective action requires them to try an alternative to a freedom of choice plan, such as a geographic attendance plan, a combination of the two, the Princeton plan,[124] or some other accepetable substitute, perhaps aided by an educational park. Freedom of choice is not a key that opens all doors to equal educational opportunities.

Given the knowledge of the educators and administrators in the Office of Education and their day to day experience with thousands of school systems, judges and school officials can ill afford to turn their backs on the proffer of advice from HEW. Or from any responsible government agency or independent group competent to work toward solution of the complex problem of de jure discrimination bequeathed this generation by ten preceding generations.

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[121] For an HEW approved desegregation plan held insufficient to protect constitutional rights of Negro students see Brown v. Board of Education of DeWitt School District, E.D. Ark. 1966, F. Supp. See also Thompson v. County School Board of Hanover County, E.D. Va. 1966, 252 F. Supp. 546; Turner v. County School Board of Goochland County, E.D. Va. 1966, 252 F. Supp. 578.

[122] "Innumerable cases have clearly established the principle that under circumstances such as this where a history of racial discrimination exists, the burden of proof has been thrown upon the party having the power to produce the facts . . ." Chambers v. Hendersonville City Board of Education, 4 Cir. 1966, 364 F.2d 189, 192. In *Brown II*, permitting desegregation with *"deliberate* speed" the Supreme Court put the "burden . . . upon the defendants to establish that [additional] time is necessary to carry out the ruling in an effective manner", 349 U.S. at 302.

[123] U.S. Comm. on Civil Rights, Survey of School Desegregation in the Southern and Border States 1965–66, p. 54.

[124] The Princeton plan involves establishing attendance zones including more than one school and assigning students by grade rather than by residence location. Thus all of the zone's students in grades 1 thorugh 3 would attend school A, while all students in grades 4 through 6 would attend school B. For a discussion of the plan see Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 Harv. L. Rev. 564, 573 (1965).

Now after twelve years of snail's pace progress toward school desegregation, courts are entering a new era. The question to be resolved in each case is: How far have formerly de jure segregated schools progressed in performing their affirmative constitutional duty to furnish equal educational opportunities to all public school children? The clock has ticked the last tick for tokenism and delay in the name of "deliberate speed".

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In the suit against the Caddo Parish School Board July 19, 1965, the United States moved to intervene under § 902 of the Civil Rights Act of 1964 (42 U.S.C. § 2000h-2). The motion was filed twelve days after the Board submitted its plan in compliance with the district court's decree of June 14, 1965, but two days before the original plaintiffs filed their objections and before the court issued its order approving the plan. The district court denied the motion on the ground that it came too late. In these circumstances we consider that the motion was timely filed and should have been granted.

This Court denied the motion of certain appellants to consolidate their cases, but allowed consolidation of briefs and, in effect, treated the cases as consolidated for purposes of appeal. The Court, however, in each case has separately considered the particular contentions of all the parties in the light of the record.

The Court REVERSES the judgments below and REMANDS each case to the district court for further proceedings in accordance with this opinion.

COX, District Judge: I reserve the right to dissent in whole or in part at a later date.

Appendix A—Proposed Decree

It is ORDERED, ADJUDGED and DECREED that the defendants, their agents, officers, employees and successors and all those in active concert and participation with them, be and they are permanently enjoined from discriminating on the basis of race or color in the operation of the school system. As set out more particularly in the body of the decree, they shall take affirmative action to disestablish all school segregation and to eliminate the effects of past racial discrimination in the operation of the school system:

I—SPEED OF DESEGREGATION

Commencing with the 1967–68 school year, in accordance with this decree, all grades, including kindergarten grades, shall be desegregated and pupils assigned to schools in these grades without regard to race or color.

II—EXERCISE OF CHOICE

The following provisions shall apply to all grades:

(a) *Who May Exercise Choice.* A choice of schools may be exercised by a parent or other adult person serving as the student's parent. A student may exercise his own choice if he (1) is exercising a choice for the ninth or a higher grade, or (2) has reached the age of fifteen at the time of the exercise of choice. Such a choice by a student is controlling unless a different choice is exercised for him by his parent or other adult person serving as his parent during the choice period or at such later time as the student exercises a choice. Each reference in this decree to a student's exercising a choice means the exercise of the choice, as appropriate, by a parent or such other adult, or by the student himself.

(b) *Annual Exercise of Choice.* All students, both white and Negro, shall be required to exercise a free choice of schools annually.

(c) *Choice Period.* The period for exercising choice shall commence May 1, 1967 and end June 1, 1967, and in subsequent years shall commence March 1 and end March 31 preceding the school year for which the choice is to be exercised. No student or prospective student who exercises his choice within the choice period shall be given any preference because of the time within the period when such choice was exercised.

(d) *Mandatory Exercise of Choice.* A failure to exercise a choice within the choice period shall not preclude any student from exercising a choice at any time before he commences school for the year with respect to which the choice applies, but such choice may be subordinated to the choices of students who exercised choice before the expiration of the choice period. Any student who has not exercised his choice of school within a week after school opens shall be assigned to the school nearest his home where space is available under standards for determining available space which shall be applied uniformly throughout the system.

(e) *Public Notice.* On or within a week before the date the choice period opens, the defendants shall arrange for the conspicuous publication of a notice describing the provisions of this decree in the newspaper most generally circulated in the community. The text of the notice shall be substantially similar to the text of the explanatory letter sent home to parents. (See paragraph II(e).) Publication as a legal notice will not be sufficient. Copies of this notice must also be given at that time to all radio and television stations serving the community. Copies of this decree shall be posted in each school in the school system and at the office of the Superintendent of Education.

(f) *Mailing of Explanatory Letters and Choice Forms.* On the first day of the choice period there shall be distributed by first-class mail an explanatory letter and a choice form to the parent (or other adult person acting as parent, if known to the defendants) of each student, together with a return envelope addressed to the Superintendent. Should the defendants satisfactorily demonstrate to the court that they are unable to comply with the requirement of distributing the explanatory letter and choice form by first-class mail, they shall propose an alternative method which will maximize individual notice, i.e., personal notice to parents by delivery to the pupil with adequate procedures to insure the delivery of the notice. The text for the explanatory letter and choice form shall essentially conform to the sample letter and choice form appended to this decree.

(g) *Extra Copies of the Explanatory Letter and Choice Form.* Extra copies of the explanatory letter and choice form shall be freely available to parents, students, prospective students, and the general public at each school in the system and at the office of the Superintendent of Education during the times of the year when such schools are usually open.

(h) *Content of Choice Form.* Each choice form shall set forth the name and location of the grades offered at each school and may require of the person exercising the choice the name, address, age of student, school and grade currently or most recently attended by the student, the school chosen, the signature of *one* parent or other adult person serving as parent, or where appropriate the signature of the student, and the identity of the person signing. No statement of reasons for a particular choice, or any other information, or any witness or other authentication, may be required or requested, without approval of the court.

(i) *Return of Choice Form.* At the option of the person completing the choice form, the choice may be returned by mail, in person, or by messenger to any school in the school system or to the office of the Superintendent.

(j) *Choices not on Official Form.* The exercise of choice may also be made by the submission in like manner of any other writing which contains information sufficient to identify the student and indicates that he has made a choice of school.

(k) *Choice Forms Binding.* When a choice form has once been submitted and the choice period has expired. the choice is binding for the entire school year and may not be changed except in cases of parents making different choices from their children under the conditions set forth in paragraph II (a) of this decree and in exceptional cases where, absent the consideration of race, a change is educationally called for or where compelling hardship is shown by the student.

(l) *Preference in Assignment.* In assigning students to schools, no preferences shall be given to any student for prior attendance at a school and, except with the approval of court in extraordinary circumstances, no choice shall be denied for any reason other than overcrowding. In case of overcrowding at any school, preference shall be given on the basis of the proximity of the school to the homes of the students choosing it, without regard to race or color. Standards for determining overcrowding shall be applied uniformly throughout the system.

(m) *Second Choice where First Choice is Denied.* Any student whose choice is denied must be promptly notified in writing and given his choice of any school in the school system serving his grade level where space is available. The student shall have seven days from the receipt of notice of a denial of first choice in which to exercise a second choice.

(n) *Transportation.* Where transportation is generally provided, buses must be routed to the maximum extent feasible in light of the geographic distribution of students, so as to serve each student choosing any school in the system. Every student choosing either the formerly white or the formerly Negro school nearest his residence must be transported to the school to which he is assigned under these provisions, whether or not it is his first choice, if that school is sufficiently distant from his home to make him eligible for transportation under generally applicable transportation rules.

(o) *Officials not to Influence Choice.* At no time shall any official teacher, or employee of the school system influence any parent, or other adult person serving as a parent, or any student, in the exercise of a choice or favor or penalize any person because of a choice made. If the defendant school board employs professional guidance counselors, such persons shall base their guidance and counseling on the individual student's particular personal, academic, and vocational needs. Such guidance and counseling by teachers as well as professional guidance counselors shall be available to all students without regard to race or color.

(p) *Protection of Persons Exercising Choice.* Within their authority school officials are responsible for the protection of persons exercising rights under or otherwise affected by this decree. They shall, without delay, take appropriate action with regard to any student or staff member who interferes with the successful operation of the plan. Such interference shall include harassment, intimidation, threats, hostile words or acts, and similar behavior. The school board shall not publish, allow, or cause to be published, the names or addresses of pupils exercising rights or otherwise affected by this decree. If officials of the school system are not able to provide sufficient protection, they shall seek whatever assistance is necessary from other appropriate officials.

III—PROSPECTIVE STUDENTS

Each prospective new student shall be required to exercise a choice of schools before or at the time of enrollment. All such students known to defendants shall be furnished a copy of the prescribed letter to parents, and choice form, by mail or in person, on the date the choice period opens or as soon thereafter as the school system learns that he plans to enroll. Where there is no pre-registration procedure for newly entering students, copies of the choice forms shall be available at the Office of the Superintendent and at each school during the time the school is usually open.

IV—TRANSFERS

(a) *Transfers for Students.* Any student shall have the right at the beginning of a new term, to transfer to any school from which he was excluded or would otherwise be excluded on account of his race or color.

(b) *Transfers for Special Needs.* Any student who requires a course of study not offered at the school to which he has been assigned may be permitted, upon his written application, at the beginning of any school term or semester, to transfer to another school which offers courses for his special needs.

(c) *Transfers to Special Classes or Schools.* If the defendants operate and maintain special classes or schools for physically handicapped, mentally retarded, or gifted children, the defendants may assign children to such schools or classes on a basis related to the function of the special class or school that is other than freedom of choice. In no event shall such assignments be made on the basis of race or color or in a manner which tends to perpetuate a dual school system based on race or color.

V—SERVICES, FACILITIES, ACTIVITIES AND PROGRAMS

No student shall be segregated or discriminated against on account of race or color in any service, facility, activity, or program (including transportation, athletics, or other extracurricular activity) that may be conducted or sponsored by or affiliated with the school in which he is enrolled. A student attending school for the first time on a desegregated basis may not be subject to any disqualification or waiting period for participation in activities and programs, including athletics, which might otherwise apply because he is a transfer or newly assigned student except that such transferees shall be subject to long-standing, non-racially based rules of city, county, or state athletic associations dealing with the eligibility of transfer students for athletic contests. All school use or school-sponsored use of athletic fields, meeting rooms, and all other school related services, facilities, activities, and programs such as Commencement exercises and parent-teacher meetings which are open to persons other than enrolled students, shall be open to all persons without regard to race or color. All special educational programs conducted by the defendants shall be conducted without regard to race or color.

VI—SCHOOL EQUALIZATION

(a) *Inferior Schools.* In schools heretofore maintained for Negro students, the defendants shall take prompt steps necessary to provide physical facilities, equipment, courses of instruction, and instructional materials of quality equal to that provided in schools previously maintained for white students. Conditions of overcrowding, as determined by pupil-teacher ratios and pupil-classroom ratios shall, to the extent feasible, be distributed evenly between schools formerly maintained for Negro students and those formerly maintained for white students. If for any reason it is not feasible to improve sufficiently any school formerly maintained for Negro students, where such improvement would otherwise be required by this subparagraph, such school shall be closed as soon as possible, and students enrolled in the school shall be reassigned on the basis of freedom of choice. By October of each year, defendants shall report to the Clerk of the Court pupil-teacher ratios, pupil-classroom ratios, and per-pupil expenditures both as to operating and capital improvement costs, and shall outline the steps to be taken and the time within which they shall accomplish the equalization of such schools.

(b) *Remedial Programs.* The defendants shall provide remedial education programs which permit students attending or who have previously attended all-Negro schools to overcome past inadequacies in their education.

VII—NEW CONSTRUCTION

The defendants, to the extent consistent with the proper operation of the school system as a whole, shall locate any new school and substantially expand any existing schools with the objective of eradicating the vestiges of the dual system and of eliminating the effects of segregation.

VIII—FACULTY AND STAFF

(a) *Faculty Employment.* Race or color shall not be a factor in the hiring, assignment, reassignment, promotion, demotion, or dismissal of teachers and other professional staff members, including student teachers, except that race may be taken into account for the purpose of counteracting or correcting the effect of the segregated assignment of teachers in the dual system. Teachers, principals, and staff members shall be assigned to schools so that the faculty and staff is not composed exclusively of members of one race. Wherever possible, teachers shall be assigned so that more than one teacher of the minority race (white or Negro) shall be on a desegregated faculty. Defendants shall take positive and affirmative steps to accomplish the desegregation of their school faculties and to achieve substantial desegregation of faculties in as many of the schools as possible for the 1967–68 school year notwithstanding that teacher contracts for the 1966–67 or 1967–68 school years may have already been signed and approved. The tenure of teachers in the system shall not be used as an excuse for failure to comply with this provision. The defendants shall establish as an objective that the pattern of teacher assignment to any particular school not be identifiable as tailored for a heavy concentration of either Negro or white pupils in the school.

(b) *Dismissals.* Teachers and other professional staff members may not be discriminatorily assigned, dismissed, demoted, or passed over for retention, promotion, or rehiring, on the ground of race or color. In any instance where one or more teachers or other professional staff members are to be displaced as a result of desegregation, no staff vacancy in the school system shall be filled through recruitment from outside the system unless no such displaced staff member is qualified to fill the vacancy. If, as a result of desegregation, there is to be a reduction in the total professional staff of the school system, the qualifications of all staff members in the system shall be evaluated in selecting the staff member to be released without consideration of race or color. A report containing any such proposed dismissals, and the reasons therefor, shall be filed with the Clerk of the Court, serving copies upon opposing counsel, within five (5) days after such dismissal, demotion, etc., as proposed.

(c) *Past Assignment.* The defendants shall take steps to assign and reassign teachers and other professional staff members to eliminate past discriminatory patterns.

IX—REPORTS TO THE COURT

(1) *Report on Choice Period.* The defendants shall serve upon the opposing parties and file with the Clerk of the Court on or before April 15, 1967, and on or before June 15, 1967, and in each subsequent year on or before June 1, a report tabulating by race the number of choice applications and transfer applications received for enrollment in each grade in each school in the system, and the number of choices and transfers granted and the number of denials in each grade of each school. The report shall also state any reasons relied upon in denying choice and shall tabulate, by school and by race of student, the number of choices and transfers denied for each such reason.

In addition, the report shall show the percentage of pupils actually transferred or assigned from segregated grades or to schools attended predominantly by pupils of a race other than the race of the applicant, for attendance during the 1966-67 school year, with comparable data for the 1965-66 school year. Such additional information shall be included in the report served upon opposing counsel and filed with the Clerk of the Court.

(2) *Report After School Opening.* The defendants shall, in addition to reports elsewhere described, serve upon opposing counsel and file with the Clerk of the Court within 15 days after the opening of schools for the fall semester of each year, a report setting forth the following information:

(i) The name, address, grade, school of choice and school of present attendance of each student who has withdrawn or requested withdrawal of his choice of school or who has transferred after the start of the school year, together with a description of any action taken by the defendants on his request and the reasons therefor.

(ii) The number of faculty vacancies, by school, that have occurred or been filled by the defendants since the order of this Court or the latest report submitted pursuant to this subparagraph. This report shall state the race of the teacher employed to fill each such vacancy and indicate whether such teacher is newly employed or was transferred from within the system. The tabulation of the number of transfers within the system shall indicate the schools from which and to which the transfers were made. The report shall also set forth the number of faculty members of each race assigned to each school for the current year.

(iii) The number of students by race, in each grade of each school.

EXPLANATORY LETTER

(School System Name and Office Address)

(Date Sent)

DEAR PARENT:

All grades in our school system will be desegregated next year. Any student who will be entering one of these grades next year may choose to attend any school in our system, regardless of whether that school was formerly all-white or all-Negro. It does not matter which school your child is attending this year. You and your child may select any school you wish.

Every student, white and Negro, must make a choice of schools. If a child is entering the ninth or higher grade, or if the child is fifteen years old or older, he may make the choice himself. Otherwise a parent or other adult serving as parent must sign the choice form. A child enrolling in the school system for the first time must make a choice of schools before or at the time of his enrollment.

The form on which the choice should be made is attached to this letter. It should be completed and returned by June 1, 1967. You may mail it in the enclosed envelope, or deliver it by messenger or by hand to any school principal or to the Office of the Superintendent at any time between May 1 and June 1. No one may require you to return your choice form before June 1 and no preference is given for returning the choice form early.

No principal, teacher or other school official is permitted to influence anyone in making a choice or to require early return of the choice form. No one is permitted to favor or penalize any student or other person because of a choice made. A choice once made cannot be changed except for serious hardship.

No child will be denied his choice unless for reasons of overcrowding at the school chosen, in which case children living nearest the school will have preference.

Transportation will be provided, if reasonably possible, no matter what school is chosen. [Delete if the school system does not provide transportation.]

Your School Board and the school staff will do everything we can to see to it that the rights of all students are protected and that desegregation of our schools is carried out succesfully.

Sincerely yours,

Superintendent.

CHOICE FORM

This form is provided for you to choose a school for your child to attend next year. You have 30 days to make your choice. It does not matter which school your child attended last year, and does not matter whether the school you choose was formerly a white or Negro school. This form must be mailed or brought to the principal of any school in the system or to the office of the Superintendent, [address], by June 1, 1967. A choice is required for each child.

Name of child ____
(Last) (First) (Middle)
Address ____
Name of Parent or other
adult serving as parent ____
If child is entering first grade, date of birth:
____
(Month) (Day) (Year)
Grade child is entering ____
School attended last year ____
Choose one of the following schools by marking an X beside the name.

Name of School	Grade	Location

Signature ____
Date ____
____
____
To be filled in by Superintendent:
School Assigned [1] ____

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[1] In subsequent years the dates in both the explanatory letter and the choice form should be changed to conform to the choice period.

Appendix B—Rate of Change and Status of Desegregation

(Leeson, Faster Pace, Scarcer Records, Southern Education Report 28–32 (Jan.-Feb. 1966), quoted in Emmerson and Huber, Political and Civil Rights in the United States, 695–99 (1967))

". . . Both the 11-State Southern area and the border area, the latter consisting of six states and the District of Columbia, experienced a sharper increase in the percentage of Negroes in desegregated schools for 1965–66 than in previous years. But only the Southern States showed a changed attitude toward reporting records by race; in only three Southern states could nearly complete statistics be obtained district by district. As in other years, three of the border states plus the District of Columbia continued to keep records by race, and three states did not.

Correspondents for Southern Education Reporting Service . . . found that 15.89 per cent of the Negroes enrolled in the public schools of the region attended classes with whites, mostly in formerly all-white schools but sometimes also in formerly all-Negro schools. This numbered 567,789 Negro students out of the region's Negro enrollment of 3,572,810.

In the first 10 years after the Supreme Court decisions on segregated schools, in 1954 and 1955, the Southern and border region increased the number of Negroes in schools with whites at an average of about one percent a year. Although the impetus of the Supreme Court's rulings and the possibility of direct involvement in legal action were factors most districts desegregated through last year acted "voluntarily" and only about 10 per cent required a specific court order. By the end of the 1964–65 school year, the region had enrolled 10.9 per cent of its Negro students in biracial classrooms.

The 1964 Civil Rights Act brought pressure on every district in the nation but the compliance effort admittedly was concentrated on the South . . . Beginning in the spring of 1965 and continuing even through the first months of the 1965–66 school year, HEW's Office of Education negotiated with officials in each district to obtain compliance by the school officials either signing a statement, submitting a court-ordered desegregation plan or adopting a voluntary plan.

With the new school year, the region had increased the number of Negroes in desegregated schools by five percentage points to reach 15.9 per cent, while in the previous two school years the rate of increase in this figure had only been between one and two percentage points. For 1964–65, the region had 10.9 per cent of the Negro enrollment in desegregated schools, an increase of 1.7 percentage points over 1963–64, and for that year the 9.2 per cent figure was an increase of 1.2 percentage points over 1962–63. (See Table 1.)

TABLE I.—THE RATE OF CHANGE, PERCENTAGE OF NEGROES IN SCHOOLS WITH WHITES

	South	Percent change	Border	Percent change	Region	Percent change
School year:						
1959-60[1]	0.160		45.4		6.4	
1960-61	.162	0.002	49.0	3.6	7.0	0.6
1961-62	.241	.079	52.5	3.5	7.6	.6
1962-63	.453	.212	51.8	.7	8.0	.4
1963-64	1.17	.717	54.8	3.0	9.2	1.2
1964-65	2.25	1.08	58.3	3.5	10.9	1.7
1965-66	6.01	3.76	68.9	10.6	15.9	5.0

[1] 1st school year in which SERS began recording number of Negroes in schools with whites.

Up through the 1962–63 school year, the 11 Southern states together had fewer than one per cent of their Negro students in schools with whites. In 1963–64, the figure passed the one per cent mark and it almost doubled for 1964–65 to become 2.25 per cent of the Negroes in biracial schools, an increase of more than one percentage point. For the 1965–66 school year, the percentage more than doubled and reached 6.01 per cent.[1]

The six border states and the District of Columbia desegregated at a faster rate than did the South, and by the 1961–62 school year that area had more than half of its Negro enrollment attending desegregated schools. The annual change in the number of Negroes in desegregated border schools averaged about three per cent a year, and by 1964–65, the border area had desegregated 58.3 per cent of its Negro enrollment. In the current school year, the border area has 68.9 per cent of its Negro students attending the same schools with whites, a jump of over 10 percentage points from the previous year's figure.

This year, as in previous years, a disparity exists between what might be called "technical" desegregation and "actual" desegregation. Last year, for example, 56 per cent of the region's Negro students were enrolled in districts having desegregation policies, but about 11 per cent of the total Negro enrollment attended desegregated schools. This year, the region has 97 per cent of its districts in official compliance with federal desegregation regulations, and 93 per cent of the region's combined Negro and white enrollment comes from these districts. However, the actual attendance of Negroes in desegregated schools amounts to almost 16 per cent. The difference in these figures was accentuated this year by the fact that almost 2,000 school districts having either all-white or all-Negro enrollments are included in the "in compliance" statistics. . . .

Among the Southern states, Texas leads in the number and percentage of Negroes in schools with whites—an estimated 60,000 Negroes or 17 per cent of the state's Negro enrollment. Tennessee ranks second in the area with 16 per cent and Virginia third with 11 per cent. Three states—Alabama, Louisiana, and Mississippi—continue to have less than one per cent of their Negro enrollment attending schools with whites. The other Southern states—Arkansas, Florida, Georgia, North Carolina and South Carolina—vary between 1 and 10 per cent of their Negro students in biracial classrooms.

All but one of the border states have more than half of their Negro enrollments in desegregated schools. Oklahoma has 38 per cent of its Negroes in biracial schools, Maryland has 56 percent, and Delaware, the District of Columbia, Kentucky, . . . Missouri and West Virginia have desegregated more than three-fourths of their Negro student population. . . .

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[1] Other estimates are summarized in Report of the United States Commission on Civil Rights, Survey of School Desegregation in the Southern and Border States 1965–66, 27–28 (Feb. 1966)

". . . The Office of Education based on a sampling of 590 districts through a telephone survey conducted in cooperation with State departments of education, estimates that 216,000, or 7.5 percent, of the Negro students in the 11 Deep South States are enrolled in school this year with white pupils. [Office of Education, telephone survey, Table I, Sept. 27, 1965.] Civil rights organizations, relying upon figures obtained from a variety of sources, including field workers, advance a lower figure. The Southern Regional Council's estimate is 151,416 Negro pupils, or 5.23 percent of the total. [Southern Regional Council, 'School Desegregation: Old Problems Under a New Law' 9, Sept. 1965.] The American Friends Service Committee and NAACP Legal Defense and Educational Fund agree that the actual figure is less than 6 per cent [American Friends Service Committee and NAACP Legal Defense and Educational Fund, 'Report on the Implementation of Title VI of the Civil Rights Act of 1964 in Regards to School Desegregation' 4, Nov. 15, 1965]."

The desegregation statistic showing the sharpest increase this year was the number of districts with desegregation policies. The region now has 4,804 public school districts that have received approval from the U. S. Office of Education for their desegregation proposals. When the last school year ended, SERS reported that 1,476 districts had desegregated in practice or in policy.

TABLE III. STATUS OF DESEGREGATION (17 SOUTHERN AND BORDER STATES AND DISTRICT OF COLUMBIA)

	School districts				Enrollment		Negroes in schools with whites	
	Total	With Negroes and whites	In compliance [1]	Not in compliance [1]	White	Negro	Number	Percent [2]
Alabama	118	119	105	14	[4] 559,123	[4] 295,848	[3] 1,250	0.43
Arkansas	410	217	400	10	[4] 337,652	[4] 111,952	[3] 4,900	4.38
Florida	67	67	67	0	[3] 1,056,805	[3] 256,063	[3] 25,000	9.76
Georgia	196	183	192	5	[3] 784,917	[3] 355,950	[3] 9,465	2.66
Louisiana	67	67	33	34	483,941	318,651	2,187	.69
Mississippi	149	149	118	31	309,413	296,834	[3] 1,750	.59
North Carolina	170	170	165	4	[4] 828,638	[4] 349,282	[3] 18,000	5.15
South Carolina	108	108	86	21	374,007	263,983	3,864	1.46
Tennessee	152	129	149	2	[3] 714,241	[3] 176,541	28,801	16.31
Texas	1,325	850	1,303	7	[3] 2,136,150	[3] 349,192	[3] 60,000	17.18
Virginia	130	127	124	12	[4] 757,037	[4] 239,729	[3] 27,550	11.49
South	2,892	2,183	2,742	140	8,341,924	3,014,025	182,767	6.01
Delaware	85	47	59	0	86,041	20,485	17,069	83.32
District of Columbia	1	1	1	0	15,173	128,843	109,270	84.81
Kentucky	200	167	204	0	[4] 713,451	[4] 59,835	46,891	78.37
Maryland	24	23	24	0	583,796	178,851	99,442	55.60
Missouri	1,096	[3] 212	675	0	843,167	105,171	[3] 79,000	75.12
Oklahoma	1,046	323	1,044	4	[3] 564,250	[3] 45,750	[3] 17,500	38.25
West Virginia	55	44	55	0	[3] 425,097	[3] 19,850	[3] 15,850	79.85
Border	2,480	817	2,062	4	3,230,965	558,785	385,022	68.90
Region	5,372	3,000	4,804	144	11,572,889	3,572,810	567,789	15.89

[1] The sum of adding the districts "in compliance" and "not in compliance" will not always equal the total number of districts because the Office of Education reports a different number of districts from that of some of the State departments of education.

[2] The number of Negroes in schools with whites, compared to the total Negro enrollment.

[3] Estimated.

[4] 1964 65.

COX, District Judge, dissenting:

The majority opinion herein impels my dissent, with deference, to its general theme, that precedent required the public schools to mix the races rather than desegregate such schools by removing all effects of state action which may have heretofore compelled segregation, so as to permit these schools to be operated upon a proper free choice plan. This Court has heretofore firmly and soundly (as decision and not gratuitously) committed itself to the views expressed by the distinguished jurists in *Briggs v. Elliott*, 132 F. Supp. 776. The majority now seeks to criticize the *Briggs* case and disparage it as dictum, although this Court in several reported decisions has embraced and adopted *Briggs* with extensive quotations from it as the decisional law of this Circuit. Surely, only two of the judges of this Court may not now single-handedly reverse those decisions and change such law of this Circuit.

These school cases all stem from the decision of the Supreme Court of the United States in the familiar *Brown* cases.[1] Nothing was said in those cases or has since been said by the Supreme Court to justify or support the extremely harsh plan of enforced integration devised by the majority decision. Significantly, there is nothing in the Civil Rights Act of 1964 to suggest the propriety of this Court adopting and following any guidelines of the Health, Education and Welfare Commissioner in these school desegregation cases in such respect. The policy statement of Congress as contained in the act itself expressly disclaims any intention or purpose to do that which these guidelines, and the majority opinion approving them, do in complete disregard thereof.

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[1] Brown I *Brown v. Board of Education of Topeka*, 347 US 483, 74 S. Ct. 686, 98 L.Ed. 873.

Brown II *Brown v. Board of Education of Topeka, Kansas*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083.

On December 6, 1965 in *Patricia Rogers, et al v. Edgar F. Paul, et al*, 382 US 198, 86 S. Ct. 358, the Court decried delays in desegregation of Public schools and called for an acceleration of the process, but neither said nor intimidated the existence of any power or the justification for any authority to forcefully mix or integrate these schools.

No informed person at this late date would now argue with the soundness of the philosophy of the *Brown* decision. That case simply declared the constitutional right of negro children to attend public schools of their own free choice without any kind of restraint by state action. That Court has made it clear that the time for "deliberate" speed in desegregating these public schools has now expired, but the majority opinion herein is the first to say that the *Brown* case, together with the Civil Rights Act of 1964, makes it necessary that these public schools must now integrate and mix these schools and their facilities, "lock, stock and barrel." That view comes as a strange construction of the Fourteenth Amendment rights of colored children. The passage of time since the rendition of the *Brown* case; and of natural disparities which are found in so many school plans before the Court; and the difficult problems posed before the Court by such plans certainly can provide no legal justification or basis for this extreme view and harsh and mailed fist decision at this time. These questions involving principles of common sense and law are readily resolved by a court of equity without being properly accused of giving an advisory opinion. The decision in such case is not overtaxing on a court of equity and its articulated conclusions can be implemented by an enforceable decree even at the expenditure of some well spent time, patience and energy of the Court. If a Court is to write a decree, it should be the decree of that Court and not the by-product of some administrative agency without knowledge or sworn obligation to resolve sacred constitutional rights and principles. Unilaterally prepared guidelines allegedly devised by the Commissioner may or not accord with his own views, but such an anomalously prepared document could not justify this Court in adopting it "lock, stock and barrel" under any pretext and even with repeated disavowals of such intention or purpose.

The Constitution of the United States is not the dead hand of the past strangling the liberties of a free people; it is a living document designed for all time to perpetuate liberty, freedom and justice for every person, young or old, who is born under or who comes within its protecting shield. As was said many years ago, "in moving water there is life, in still waters there is stagnation and death." The Constitution was framed not for one era, but for all time. But when the Courts transform viability into elasticity, constitutional rights are illusory. The rope of liberty may be twisted and become a garrote which strangles those who seek its protection. If the majority opinion in these cases is permitted to stand, it will, in the name of protecting civil rights of some, destroy civil rights and constitutional liberties of all our citizens, their children and their children's children.

The Supreme Court, in *Brown II*, said that "school authorities have the primary responsibility for elucidating, assessing and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles." It thereupon became the duty of the Court, acting as a Court of Equity, under such principles to see that public schools, still operating under the dual system by state action, were *desegregated* (not integrated) in accordance with the vested constitutional right of colored children. Judicial haste and impatience cannot justify this Court in equating integration with desegregation. No Court up to this time has been heard to say that this Court now has the power and the authority to force integration of both races upon these public schools without regard to any equitable considerations, or the will or wish of either race. The decisions of this Court deserve and must have stability and integrity. It was the 1965 guidelines of HEW that were approved by this Court in *Derek Jerome Singleton v. Jackson Municipal Separate School District*, 255 F.2d 865. Judge Wisdom wrote for the Court and Judge Thornberry concurred in that case on January 26, 1966; and there was not a word in that case to the effect that this Court then thought that any decision or statute or guidelines under any statute required or justified *forced integration*. Almost before that slip opinion reached the bound volume, this Court has now written on December 29, 1966, a vastly different opinion with no change intervening in the law.

The last reported school case from this Circuit, decided August 16, 1966 by Judge Tuttle and Judge Thornberry in *Birdie Mae Davis, et al v. Board of School Commissioners of Mobile County, et al*, 364 F.2d 896, this Court still wrote of accelerating a plan of *desegregation*. As if to foreshadow the point of Judge Wisdom's "nettle" in the majority opinion in this case, Judge Tuttle wrote in his Note 1 an explanation of his changing requirements in these school cases for the delayed enjoyment of constitutional rights by accelerating *desegregation*. Davis said that negro children, as individuals, had the right to transfer to schools from which they were excluded because of their race, and said that this had been the law since the *Brown* decision; but that misunderstanding of that principle was perhaps due to the popularity "of an oversimplified dictum that the Constitution does not require integration. Briggs v. Elliott, 132 F. Supp. 776, 777." That is the first and only expressed criticism of Briggs found among the decisions of this Circuit, but the Court did not comment upon the viability and soundness of the many decisions of this Circuit which wholeheartedly embraced and repeatedly reaffirmed the so-called dicta in *Briggs*. *Davis* dealt with an urban area in Mobile, Alabama, while these cases deal with small communities or rural schools but that could have no possible bearing on desegregation versus or as distinguished from immediate forced integration or mixing of these schools.

In *Alfred Avery, Jr., a Minor by his Mother and Next Friend, Mrs. Alfred Avery, et al v. Wichita Independent School District, et al*, 241 F.2d 230 (1957), this Court said:

"The Constitution as construed in the School Segregation Cases, Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873; Id., 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, and Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884, forbids any state action requiring segregation of children in public schools solely on account of race; it does not, however, require actual integration of the races. As was well said in Briggs v. Elliott, D.C.E.D. S.C., 132 F. Supp. 776, 777:

"* * * it is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals."

Again, this Court in *Hilda Ruth Borders, a Minor, et al v. Dr. Edwin L. Rippy, et al.* 247 F.2d 268 (1957) said: "The equal protection and due process clauses of the Fourteenth Amendment do not affirmatively command integration, but they do forbid any state action requiring segregation on account of their race or color of children in the public schools. Avery v. Wichita Falls Independent School District, 5 Cir., 1957, 241 F.2d 230, 233. Pupils may, of course, be separated according to their degree of advancement or retardation, their ability to learn, on account of their health, or for any other legitimate reason but each child is entitled to be treated as an individual without regard to his race or color."

In a public housing case, participated in by Judge Wisdom, *Queen Cohen v. Public Housing Administration*, 257 F.2d 73, it is said: "Neither the Fifth nor the Fourteenth Amendment operates positively to command integration of the races, but only negatively to forbid governmentally enforced segregation."

This Court in *Sandra Craig Boston, et al v. Dr. Edwin L. Rippy, et al.* 285 F.2d 43, said: "Indeed, *this Court has adopted the reasoning* in Briggs 1. Elliott, D.C.E.D. S.C. 1955, 132 F. Supp. 776, relied on by the Sixth Circuit, and has further said: 'The equal protection and due process clauses of the fourteenth amendment do not affirmatively command integration, but they do forbid any state action requiring segregation on account of their race or color of children in the public schools. Avery v. Wichita Falls Independent School District, 5 Cir., 1957, 241 F.2d 230, 233. Pupils may, of course, be separated according to their degree of advancement or retardation, their ability to learn, on account of their health, or for any other legitimate reason, but each child is entitled to be treated as an individual without regard to his race or color.' Borders v. Rippy, 5 Cir., 1957, 247 F.2d 268, 271.

"Nevertheles, with deference to the views of the Sixth Circuit, it seems to us that classification according to race for purposes of transfer is hardly less unconstitutional than such classification for purposes of original assignment to a public school." It is that decision in

Briggs v. Elliott, supra, which the majority here now seek to criticize and repudiate.

In *Ralph Stell, et al v. Savannah-Chatham County Board of Education, et al.* (5CA) 333 F.2d 55, 59, in footnote 2 it is said: "No court has required a 'compulsory racially integrated school system' to meet the constitutional mandate that there be no discrimination on the basis of race in the operation of public schools. See Evers v. Jackson Municipal Separate School District, 5 Cir., 1964, 328 F.2d 408, and cases there cited. The interdiction is against enforced racial segregation. Incidental integration, of course, occurs through the process of desegregation. Cf. Stone v. Board of Education of Atlanta, 5 Cir., 1962, 309 F.2d 638."

This Court in *Darrell Kenyatta Evers, et al v. Jackson Municipal Separate School District*, 328 F.2d 408 (1964) said: "This is not to say that the Fourteenth Amendment commands integration of the races in the schools, or that voluntary segregation is not legally permissible. See Avery v. Wichita Falls Ind. School Dist., 5 Cir., 1957, 241 F.2d 230; Rippy v. Borders, 5 Cir., 1957, 250 F.2d 690; Cohen v. Public Housing Administration, 5 Cir., 1958, 257 F.2d 73, cert. den., 358 U.S. 928, 79 S.Ct. 315, 3 L.Ed. 2d 302; Holland v. Board of Public Instruction, supra; and Shuttlesworth v. Birmingham Board of Education, supra. The Supreme Court did not hold otherwise in Brown v. Board of Education, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873." The same teaching is expressed in a park case from this Court, styled *City of Montgomery, Alabama v. Georgia Theresa Gilmore*, 277 F.2d 364. In the many cases from this Court involving the race issue in public schools (there being some forty-one of them according to the majority opinion), not one of them speaks of any requirement or duty of the school to forcefully integrate the races, or to compel the races to mix with each other in public schools; but every one of them speak of *desegregating* such schools. The word desegregate does not appear in Webster's New International Dictionary, Second Edition, Edited in 1950. But Webster's New Collegiate Dictionary (a Merriam-Webster) defines *desegregation* as: "To free itself of any law, provision or practice requiring isolation of the members of a particular race in separate units, especially in military service or in education."

In sum, there is no law to require one of these public schools to integrate or force mix these races in public schools. But these public schools, which have been heretofore segregated by state action, and operate under a dual system, should be required to remove every vestige of state influence toward segregation of the races in these schools, and these colored children should be fully advised of their constitutional right to attend public schools of their choice, completely without regard to race. Many problems exist and are created by the proper enforcement of desegregation plans that will assure a full sweep of real freedom of choice to these negro children, and this Court cannot by only two of its members become impatient as trail-blazers and rewrite the decisional law of this Circuit as my good friends have undertaken to do in this case.

Such a course would do violence to the ancient rule of Stare Decisis. In *Donnelly Garment Co. v. National Labor Relations Board*, (8CCA) 123 F.2d 215: "It is a long-established rule that judges of the same court will not knowingly review, reverse or overrule each other's decisions. Shreve v. Chessman, 8 Cir., 69 F. 785, 790, 791; Plattner Implement Co. v. International Harvester Co., 8 Cir., 133 F. 376, 378,

379. The necessity of such a rule in the interest of an orderly administration of justice is clear." In *Sanford Napoleon Powell v. United States*, (7CA) 338 F.2d 556 (1964), it is said: "Our decision in Lauer has been criticized. However, this decision is the law of this Circuit unless and until this Court (presumably sitting en banc) would determine otherwise or unless higher authority might so determine."

Rule 25(a) of the Fifth Circuit provides for a rehearing in any case upon vote of a majority of the circuit judges in active service for any reason which appears to them to be sufficient in the particular case. Ordinarily, a hearing or rehearing en banc is not ordered except "when necessary to secure or maintain uniformity or continuity in the decisions of the court, etc." The majority opinion simply does not reflect the well considered and firmly stated composite decision of this Circuit; and in that view, is not an accurate or proper statement of the law in this case as it now exists in the Fifth Circuit.

The Civil Rights Act of 1964 (42 U.S.C., 1958 ed., § 2000c-6) refers to "desegregation in public education" and not to forced mixing or integration of the races. That same section states "provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards." The English language simply could not be summoned to state any more clearly than does that very positive enactment of Congress, that these so-called 'guidelines" of this administrative agency are not sacrosanct expositions of school law (if so intended), but are actually promulgated and being used in opposition to and in violation of this positive statute. Contrary to the majority opinion, it was never the intention or purpose of the Congress to constitute the Commissioner of Health, Education and Welfare as the sidewalk superintendent of this Court in these school cases. On the contrary, 42 U.S.C., 1958 ed., § 2000c-2 provides that the Commissioner, *only upon application* of a *school board, state, municipality, school district* or *other governmental unit*, can render any technical assistance to such an applicant. Nowhere in that act is it contemplated that this court should abdicate its power and authority to act upon and decide a case on appeal to it as a court of equity, and simply decide it by rubber stamping one of the annual guideline bulletins of an administrative bureau of the United States in Washington. The attitude and position of this Court in doing exactly that in this case is not improved by disavowing any intention or purpose to do so.

There were seven consolidated cases before the Court which are embraced in this decision. Most, if not all, of the plans in those cases were defective and needed updating for a more realistic and effective application of the free choice principle under the former decisions of this Court; but they did not need or deserve the harsh and unprecedented treatment accorded these schools by the majority decision in these cases. The colored children are not befriended and their lot is not improved by this unprecedented majority opinion and the entire school system will suffer under the impact of this improvident administrative directive as thus adopted by this Court.

My duty impels me to file this DISSENT to the majority view in these cases with great deference to both of my distinguished associates.

UNITED STATES OF AMERICA AND LINDA STOUT, BY HER FATHER AND NEXT FRIEND, BLEVIN STOUT, APPELLANTS,

v.

JEFFERSON COUNTY BOARD OF EDUCATION ET AL., APPELLEES.

UNITED STATES OF AMERICA, APPELLANT,

v.

THE BOARD OF EDUCATION OF THE CITY OF FAIRFIELD ET AL., APPELLEES.

UNITED STATES OF AMERICA, APPELLANT,

v.

THE BOARD OF EDUCATION OF THE CITY OF BESSEMER ET AL., APPELLEES.

UNITED STATES OF AMERICA, APPELLANT,

v.

CADDO PARISH SCHOOL BOARD ET AL., APPELLEES.

UNITED STATES OF AMERICA, APPELLANT,

v.

THE BOSSIER PARISH SCHOOL BOARD ET AL., APPELLEES.

MARGARET M. JOHNSON ET AL., APPELLANTS,

v.

JACKSON PARISH SCHOOL BOARD ET AL., APPELLEES.

YVORNIA DECAROL BANKS ET AL., APPELLANTS,

v.

CLAIBORNE PARISH SCHOOL BOARD ET AL., APPELLEES.

JIMMY ANDREWS ET AL., APPELLANT,

v.

CITY OF MONROE, LOUISIANA ET AL., APPELLEES.

CLIFFORD EUGENE DAVIS, JR., ET AL., APPELLANTS,

v.

EAST BATON ROUGE PARISH SCHOOL BOARD ET AL., APPELLEES.

Nos. 23345, 23331, 23335, 23274, 23365, 23173, 23192, 23253, 23116.

United States Court of Appeals Fifth Circuit.

March 29, 1967.

Dissenting Opinion June 27, 1967.

Certiorari Denied Oct. 9, 1967.

See 88 S.Ct. 72, 77.

School desegregation cases. The United States District Court for the Northern District of Alabama, Seybourn H. Lynne, Chief Judge, and Harlan Hobart Grooms J., the District Court for the Western District of Louisiana, Benjamin C. Dawkins, Jr., Chief Judge, and the District Court for the Eastern District of Louisiana, E. Gordon West, J., entered judgment from which appeals were taken. The Court of Appeals, Wisdom, Circuit Judge, 372 F.2d 836, reversed and remanded. On petitions for rehearing, the Court of Appeals, sitting en banc, adopted the majority opinion of the original panel, and held that school boards have an affirmative duty to bring about integrated, unitary school systems. The Court overruled certain cases which distinguished between "desegregation" and "integration". It held the percentages referred to in the decree were intended as rules of thumb in measuring the effectiveness of freedom of choice school integration plans.

The court reaffirmed the reversal of the judgments below and the remand of each case for entry of decree attached to opinion.

Gewin, Griffin B. Bell and Godbold, Circuit Judges, dissented.

1. Schools and School Districts ⇨151

Negro school children must have equal educational opportunities with white children.

2. Constitutional Law ⇨220

Boards and officials administering public schools have the affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school ssytem in which there are no unintegrated schools and in fulfilling duty it is not enough for school authorities to offer Negro children the opportunity to attend formerly all-white schools: overruling certain cases which distinguished between "desegregation" and "integration." U.S.C.A. Const. Amend. 14.

3. Constitutional Law ⇨220
Schools and School Districts ⇨13

Necessity of overcoming effects of segregated school system requires integration of faculties, facilities, and activities, as well as students. U.S.C.A. Const. Amend. 14.

4. Schools and School Districts 🔑154

A school child has no inalienable right to choose his school and a freedom of choice desegregation plan is but one of the tools available to school officials for converting dual system of schools for Negroes and whites into a unitary system.

5. Constitutional Law 🔑220
Schools and School Districts 🔑13

Criterion for determining validity of provisions in school desegregation plan is whether provision is reasonably related to accomplishing objective of converting dual system of separate schools for Negroes and whites into a unitary system. U.S.C.A. Const. Amend. 14.

6. Constitutional Law 🔑220
Schools and School Districts 🔑13

Percentages referred to in HEW guidelines and in judicial decree are simply a rough rule of thumb for measuring effectiveness of freedom of choice as useful tool in converting dual system of separate schools for Negroes and whites into a unitary system and are not a method for setting quotas or striking a balance, and if desegregation plan based on percentages is ineffective, school officials charged with initiating and administering unitary system have not met the constitutional requirements of the Fourteenth Amendment and should try other tools. U.S.C.A.Const. Amend. 14.

7. Constitutional Law 🔑220
Schools and School Districts 🔑13

HEW guidelines establish minimum standards for disestablishing state-sanctioned segregation and meet the constitutional requirements. U.S.C.A.Const. Amend. 14.

8. Constitutional Law 🔑220
Schools and School Districts 🔑13

Courts the Fifth Circuit should give great weight to future HEW guidelines in seeking to disestablish state-sanctioned segregation in school systems. U.S.C.A.Const. Amend. 14.

No. 23345:

Macon L. Weaver, U.S. Atty., Birmingham, Ala., Norman C. Amaker, New York City, David L. Norman, Atty., Dept. of Justice, Washington, D.C., William G. Somerville, Jr., Birmingham, Ala., John Doar, Asst. Atty. Gen., Dept. of Justice, Washington, D.C., Nicholas deB. Katzenbach, Atty. Gen., Brian K. Landsberg, Leroy D. Clark, Alfred Feinberg, New York City, Vernon Z. Crawford, Mobile, Ala., John H. Ruffin, Jr., Augusta, Ga., Howard Moore Jr., Atlanta, Ga., St. John Barrett, Joel M. Finkelstein, Charles R. Nesson, Elihu Leifer, Attys., Dept. of Justice, Washington, D.C., Orzell Billingsley, Jr., Birmingham, Ala., David H. Hood, Jr., Bessemer, Ala., Jesse N. Stone, Jr., Shreveport, La., A. P. Tureaud, New Orleans, La., Johnnie Jones, Baton Rouge, La., Jack Greenberg, James M. Nabrit, III, Michael Meltsner, Henry Aronson, Charles H. Jones, Jr., New York City, Oscar W. Adams, Jr., Demetrius C. Newton, Birmingham, Ala., Shelia Rush Jones, Conrad K. Harper, Fred Wallace, New York

City, Gerald A. Smith, Baltimore, Md., of counsel, for appellants and intervenors.

Maurice F. Bishop, Birmingham, Ala., John C. Satterfield, Yazoo City, Miss., for appellees.

No. 23331:

Macon L. Weaver, U.S. Atty., Demetrius C. Newton, Orzell Billingsley, Jr., Birmingham, Ala., David L. Norman, Atty., Dept of Justice, Washington, D.C., William G. Somerville, Jr., Birmingham, Ala., John Doar, Asst. Atty. Gen., Nicholas deB. Katzenbach, Atty. Gen., Brian K. Landsberg, St. John Barrett, Elihu Leifer, Joel Finkelstein, Attys., Dept. of Justice, Washington, D.C., Jack Greenberg, James M. Nabrit, III, Michael Meltsner, Leroy D. Clark, Norman C. Amaker, Alfred Feinberg, Henry Aronson, New York City, David H. Hood, Jr., Bessemer, Ala., Jesse N. Stone, Jr., Shreveport, La., A. P. Tureaud, New Orleans, La., Vernon Z. Crawford, Mobile, Ala., Oscar W. Adams, Jr., Birmingham, Ala., Johnnie Jones, Baton Rouge, La., John H. Ruffin, Jr., Augusta, Ga., Howard Moore, Jr., Atlanta, Ga., Sheila Rush Jones, Conrad K. Harper, Fred Wallace, New York City, Gerald A. Smith, Baltimore, Md., of counsel, for appellants and intervenors.

Maurice F. Bishop, Birmingham, Ala., John C. Satterfield, Yazoo City, Miss., for appellees.

No. 23335:

Macon L. Weaver, U.S. Atty., Birmingham, Ala., David L. Norman, Atty., Dept. of Justice, Washington, D.C., Oscar W. Adams, Jr., William G. Somerville, Jr., Birmingham, Ala., John Doar, Asst. Atty. Gen., Dept. of Justice, Civil Rights Div., Washington, D.C., Nicholas deB. Katzenbach, Atty. Gen., St. John Barrett, Brian K. Landsberg, Attys., Dept. of Justice, Washington, D.C., Elihu Leifer, Joel Finkelstein, Attys., Dept. of Justice, Washington, D.C., Jack Greenberg, James M. Nabrit, III, Michael Meltsner, Leroy D. Clark, Norman C. Amaker, Henry Aronson, Charles H. Jones, Jr., Alfred Feinberg, New York City, David H. Hood, Jr., Bessemer, Ala., Jesse N. Stone, Jr., Shreveport, La., A. P. Tureaud, New Orleans, La., Vernon Z. Crawford, Mobile, Ala., Oscar W. Adams, Jr., Birmingham, Ala., Demetrius C. Newton, Orzell Billingsley, Jr., Birmingham, Ala., Johnnie Jones, Baton Rouge, La., John H. Ruffin, Jr., Augusta, Ga., Howard Moore, Jr., Atlanta, Ga., Sheila Rush Jones, Conrad K. Harper, Fred Wallace, New York City, Gerald A. Smith, Baltimore, Md., of counsel, for appelants and intervenors.

Reid B. Barnes, Birmingham, Ala., John C. Satterfield, Yazoo City, Miss., Lange, Simpson, Robinson & Somerville, Birmingham, Ala., J. Howard McEniry, Jr., McEniry, McEniry & McEniry, Bessemer, Ala., for appellees.

No. 23274:

David L. Norman, Atty., Dept. of Justice, Washington, D.C., Norman C. Amaker, Charles H. Jones, Jr., New York City, A. P. Tureaud, New Orleans, La., John Doar, Asst. Atty. Gen., Dept. of Justice, Civil Rights Div., Washington, D.C., Edward L. Shaheen, U.S. Atty., St. John Barrett, Alexander C. Ross, Elihu Leifer, Joel Finkelstein, Attys., Dept. of Justice, Washington, D.C., David H. Hood, Jr., Bessemer, Ala., Jesse N. Stone, Jr., Shreveport, La., Johnnie Jones, Baton Rouge, La., Jack Greenberg, James M. Nabrit, III, Michael Meltsner, Henry Aronson, New York City, Oscar W. Adams, Jr., Demetrius C. Newton, Birmingham, Ala., Leroy D. Clark, Alfred Feinberg, New York City, Vernon Z. Crawford, Mobile, Ala., John H. Ruffin, Jr., Augusta, Ga., Howard Moore, Jr., Atlanta, Ga., Sheila Rush Jones, Conrad K. Harper, Fred Wallace, New York City, Gerald A. Smith, Baltimore, Md., of counsel, for appellants and intervenors.

William P. Schuler, 2nd Asst. Atty. Gen. of La., Arabi, La., John A. Richardson, Shreveport, La., Jack P. F. Gremillion, Atty. Gen. of La., Louis H. Padgett, Dist. Atty., 26th Judicial Dist., Bossier City, La., Fred L. Jackson, Dist. Atty., Second Judicial Dist., Homer, La., for appellees.

No. 23365:

David L. Norman, Atty., Dept. of Justice, Washington, D.C., James M. Nabrit, III, New York City, John Doar, Asst. Atty. Gen., Dept. of Justice, Civil Rights Div., Washington, D.C., Edward L. Shaheen, U.S. Atty., St. John Barrett, Elihu I. Leifer, Joel Finkelstein, Attys., Dept. of Justice, Washington, D.C., Jesse N. Stone, Jr., Shreveport, La., Jack Greenberg, Norman C. Amaker, Michael Meltsner, Leroy D. Clark, New York City, David H. Hood, Jr., Besssemer, Ala., Jesse N. Stone, Jr., Shreveport, La., A. P. Tureaud, New Orleans, La., Henry Aronson, Charles H. Jones., Jr., New York City, Vernon Z. Crawford, Mobile, Ala., Oscar W. Adams, Jr., Demetrius C. Newton, Birmingham, Ala., Johnnie Jones, Baton Rouge, La., John H. Ruffin, Jr., Augusta, Ga., Howard Moore, Jr., Atlanta, Ga., Conrad K. Harper, New York City, Gerald A. Smith, Baltimore, Md., Alfred Feinberg, New York City, of counsel, for intervenors and appellants.

J. Bennett Johnston, Jr., Shreveport, La., Jack P. F. Gremillion, Atty. Gen., State of La., Baton Rouge, La., William P. Schuler, Asst. Atty. Gen., State of La., Louis H. Padgett, Jr., Dist. Atty., Bossier Parish, La., Fred L. Jackson, Dist. Atty., Second Judicial Dist., Homer, La., John A. Richardson, Dist. Atty., First Judicial Dist., Shreveport, La., for appellees.

No. 23173:

Alvin J. Bronstein, Jackson, Miss., Harris David, New Orleans, La., Carl Rachlin, New York City, David Norman, Atty., Dept. of Justice, Washington, D.C., John Doar, Asst. Atty. Gen., Dept. of Justice, Civil Rights Div., Washington, D.C., Edward L. Shaheen, U.S. Atty., St. John Barrett, Frank M. Dunbaugh, Albert S. Pergam, Attys., Department of Justice, Washington, D.C., Elihu Leifer, Joel Finkelstein, Attys., Dept. of Justice, Washington, D.C., Jesse N. Stone, Jr., Shreveport, La., James Sharp, Jr., Monroe, La., William Q. Keenan, New York City, Robert F. Collins, Nils R. Douglas, Lolis E. Elie, New Orleans, La., for appellants.

Fred L. Jackson, Dist. Atty., Homer, La., William H. Baker, Jonesboro, La., Teddy W. Airhart, Jr., Asst. Atty. Gen. of La., Baton Rouge, La., Jack P. F. Gremillion, Atty. Gen. of La., Baton Rouge, La., Louis H. Padgett, Jr., Dist. Atty., Twenty-Sixth Judicial Dist., Bossier City, La., William P. Schuler, 2nd Asst. Atty. Gen. of La., John A. Richardson, Dist. Atty., First Judicial Dist., Shreveport, La., for appellees.

No. 23192:

Alvin J. Bronstein, Jackson, Miss., Carl Rachlin, New York City, Harris David, Robert F. Collins, New Orleans, La., John Doar, Asst. Atty. Gen., Dept. of Justice, Civil Rights Div., Washington, D.C., Edward L. Shaheen, U.S. Atty., St. John Barrett, David L. Norman, Elihu I. Leifer, Joel Finkelstein, Attys., Dept. of Justice, Washington, D.C., Jesse N. Stone, Jr., Shreveport, La., James Sharp, Jr., Monroe, La., William Q. Keenan, New York City, Robert F. Collins, Nils R. Douglas, Lolis E. Elie, New Orleans, La., for appellants and intervenors.

William P. Schuler, Arabi, La., Jack P. F. Gremillion, Atty. Gen. of La., Thomas McFerrin, Sr., Harry Kron, Jr., Asst. Atty. Gen., Baton Rouge, La., Fred L. Jackson, Homer, La., Teddy W. Airhart, Jr., Asst. Atty. Gen., Baton Rouge, La., Louis H. Padgett, Jr., Dist. Atty., Twenty-Sixth Judicial Dist., Bossier City, La., John A. Richardson, Dist. Atty., First Judicial Dist., Shreveport, La., for appellees.

No. 23253:

Alvin J. Bronstein, Jackson, Miss., Stanley E. Tolliver, Cleveland, Ohio, William Q. Keenan, New York City, James M. Nabrit, III, New York City, Jesse N. Stone, Jr., Shreveport, La., James Sharp, Jr., Monroe, La., Carl Rachlin, William Q. Keenan, New York City, Robert F. Collins, Nils R. Douglas, Lolis E. Elie, New Orleans, La., for appellant and intervenors.

William F. Pipes, Jr., Albin P. Lassiter, Dist. Atty., Monroe, La., Harold B. Judell, New Orleans, La., William P. Schuler, Arabi, La., for appellees.

No. 23116:

A. P. Tureaud, New Orleans, La., Norman C. Amaker, James M. Nabrit, III, New York City, Michael Meltsner, Leroy D. Clark, Henry Aronson, Charles H. Jones, Jr., New York City, Alfred Feinberg, New York City, David H. Hood, Jr., Bessemer, Ala., Jesse N. Stone, Jr., Shreveport, La., A. P. Tureaud, New Orleans, La., Vernon Z. Crawford, Mobile, Ala., Oscar W. Adams, Jr., Birmingham, Ala., Demetrius C. Newton, Birmingham, Ala., Johnnie Jones, Baton Rouge, La., John H. Ruffin, Jr., Augusta, Ga., Howard Moore, Jr., Atlanta, Ga., Jack Greenberg, New York City, Johnnie Jones, Baton Rouge, La., Robert Belton, Conrad K. Harper, New York City, of counsel, for appellants and intervenors.

John F. Ward, Jr., Baton Rouge, La., William P. Schuler, Arabi, La., Burton, Roberts & Ward, Baton Rouge, La., for appellees.

ON PETITIONS FOR REHEARING EN BANC.

Before TUTTLE, Chief Judge, and BROWN, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER and SIMPSON, Circuit Judges.

PER CURIAM:

1. The Court sitting en banc adopts the opinion and decree filed in these cases December 29, 1966, subject to the clarifying statements in this opinion and the changes in the decree attached to this opinion.

[1] 2. School desegregation cases involve more than a dispute between certain Negro children and certain schools. If Negroes are ever to enter the mainstream of American life, as school children they must have equal educational opportunities with white children.

[2, 3] 3. The Court holds that boards and officials administering public schools in this circuit [1] have the affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system in which there are no Negro schools and no white schools—just schools. Expressions in our earlier opinions distinguishing between integration and desegregation [2] must yield to this affirmative duty we now recognize. In fulfilling this duty it is not enough for school authorities to offer Negro children the opportunity to attend formerly all-white schools. The necessity of overcoming the effects of the dual school system in this circuit requires integration of faculties, facilities, and activities, as well as students. To the extent that earlier decisions of this Court (more in the language of the opinions, than in the effect of the holdings) conflict with this view, the decisions are overruled. We refer specifically to the cases listed in footnote 3 of this opinion.[3]

[4, 5] 4. Freedom of choice is not a goal in itself. It is a means to an end. A schoolchild has no inalienable right to choose his school. A freedom of choice plan is but one of the tools available to school officials *at this stage* of the process of converting the dual system of separate schools for Negroes and whites into a unitary system. The governmental objective of this conversion is—educational opportunities on equal terms to all. The criterion for determining the validity of a provision in a school desegregation plan is whether the provision is reasonably related to accomplishing this objective.

[6] 5. The percentages referred to in the Guidelines and in this Court's decree are simply a rough rule of thumb for measuring the effectiveness of freedom of choice as a useful tool. The percentages are not a method for setting quotas or striking a balance. If the plan is ineffective, longer on promises than performance, the school officials charged with initiating and administering a unitary system have not met the constitutional requirements of the Fourteenth Amendment; they should try other tools.

[7, 8] 6. In constructing the original and revised decrees, the Court gave great weight to the 1965 and 1966 HEW Guidelines. These Guidelines establish minimum standards clearly applicable to disestablishing state-sanctioned segregation. These Guidelines and our decree are within the decisions of this Court, comply with the letter and spirit of the Civil Rights Act of 1964, and meet the requirements of the United

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[1] "In the South", as the Civil Rights Commission has pointed out, the Negro "has struggled to get into the neighborhood school. In the North, he is fighting to get out of it." Civ.Rts.Comm.Rep., Freedom to the Free. 207 (1963).

This Court did not "excuse" neighborhood schools in the North and West which have de facto segregation. No case involving that sort of school system was before the Court.

School segregation is "inherently unequal" by any name and wherever located. But de facto segregation resulting from residential patterns in a non-racially motivated neighborhood school system has problems peculiar to such a system. The school system is already a unitary one. The difficulties lie in finding state action and in determining how far school officials must go and how far they may go in correcting racial imbalance. In such cases Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948) may turn out to be as important as *Brown*. A broad-brush doctrinaire approach, therefore, that *Brown's* abolition of the dual school system solves all problems is conceptually and pragmatically inadequate for dealing with de facto-segregated neighborhood schools.

We leave the problems of de facto segregation in a unitary system to solution in appropriate cases by the appropriate courts.

[2] This distinction was first expressed in Briggs v. Elliott, E.D.S.C. 1955, 132 F. Supp. 776: "The Constitution, in other words, does not require integration. It merely forbids discrimination."

[3] Avery v. Wichita Falls Independent School District, 1956, 241 F.2d 230; Borders v. Rippy, 1957, 247 F.2d 268; Rippy v. Borders, 1957, 250 F.2d 690; Cohen v. Public Housing Administration, 1958, 257 F.2d 73; City of Montgomery, Ala. v. Gilmore, 1960, 277 F.2d 364; Boson v. Rippy, 1960, 285 F.2d 43; Stell v. Savannah-Chatham County Board of Education, 1964, 333 F.2d 55; Evers v. Jackson Municipal Separate School District, 1964, 328 F.2d 408; Lockett v. Board of Education of Muscogee County, 1965, 342 F.2d 225.

States Constitution. Courts in this circuit should give great weight to future HEW Guidelines, when such guidelines are applicable to this circuit and are within lawful limits. We express no opinion as to the applicability of HEW Guidelines in racially imbalanced situations such as occur in some other circuits where it is contended that state action may be found in state tolerance of de facto segregation or in such action as the drawing of attendance boundaries based on a neighborhood school system.

The Court reaffirms the reversal of the judgments below and the remand of each case for entry of the decree attached to this opinion.

The mandate will issue immediately.

CORRECTED DECREE

It is **ORDERED, ADJUDGED** and **DECREED** that the defendants, their agents, officers, employees and successors and all those in active concert and participation with them, be and they are permanently enjoined from discriminating on the basis of race or color in the operation of the school system. As set out more particularly in the body of the decree, they shall take affirmative action to disestablish all school segregation and to eliminate the effects of the dual school system:

I—SPEED OF DESEGREGATION

Commencing with the 1967–68 school year, in accordance with this decree, all grades, including kindergarten grades, shall be desegregated and pupils assigned to schools in these grades without regard to race or color.

II—EXERCISE OF CHOICE

The following provisions shall apply to all grades:

(a) *Who May Exercise Choice.* A choice of schools may be exercised by a parent or other adult person serving as the student's parent. A student may exercise his own choice if he (1) is exercising a choice for the ninth or a higher grade, or (2) has reached the age of fifteen at the time of the exercise of choice. Such a choice by a student is controlling unless a different choice is exercised for him by his parent or other adult person serving as his parent during the choice period or at such later time as the student exercises a choice. Each reference in this decree to a student's exercising a choice means the exercise of the choice, as appropriate, by a parent or such other adult, or by the student himself.

(b) *Annual Exercise of Choice.* All students, both white and Negro, shall be required to exercise a free choice of schools annually.

(c) *Choice Period.* The period for exercising choice shall commence May 1, 1967 and end June 1, 1967, and in subsequent years shall commence March 1 and end March 31 preceding the school year for which the choice is to be exercised. No student or prospective student who exercises his choice within the choice period shall be given any preference because of the time within the period when such choice was exercised.

(d) *Mandatory Exercise of Choice.* A failure to exercise a choice within the choice period shall not preclude any student from exercising a choice at any time before he commences school for the year with respect to which the choice applies, but such choice may be subordinated to the choices of students who exercised choice before the expiration of the choice period. Any student who has not exercised his choice of school within a week after school opens shall be assigned to the school nearest his home where space is available under standards for determining available space which shall be applied uniformly throughout the system.

(e) *Public Notice.* On or within a week before the date the choice period opens, the defendants shall arrange for the conspicuous publication of a notice describing the provisions of this decree in the newspaper most generally circulated in the community. The text of the notice shall be substantially similar to the text of the explanatory letter sent home to parents. Publication as a legal notice will not be sufficient. Copies of this notice must also be given at that time to all radio and television stations located in the community. Copies of this decree shall be posted in each school in the school system and at the office of the Superintendent of Education.

(f) *Mailing of Explanatory Letters and Choice Forms.* On the first day of the choice period there shall be distributed by first-class mail an explanatory letter and a choice form to the parent (or other adult person acting as parent, if known to the defendants) of each student, together with a return envelope addressed to the Superintendent. Should the defendants satisfactorily demonstrate to the court that they are unable to comply with the requirement of distributing the explanatory letter and choice form by first-class mail, they shall propose an alternative method which will maximize individual notice, e.g., personal notice to parents by delivery to the pupil with adequate procedures to insure the delivery of the notice. The text for the explanatory letter and choice form shall essentially conform to the sample letter and choice form appended to this decree.

(g) *Extra Copies of the Explanatory Letter and Choice Form.* Extra copies of the explanatory letter and choice form shall be freely available to parents, students, prospective students, and the general public at each school in the system and at the office of the Superintendent of Education during the times of the year when such schools are usually open.

(h) *Content of Choice Form.* Each choice form shall set forth the name and location and the grades offered at each school and may require of the person exercising the choice the name, address, age of student, school and grade currently or most recently attended by the student, the school chosen, the signature of *one* parent or other adult person serving as parent, or where appropriate the signature of the student, and the identity of the person signing. No statement of reasons for a particular choice, or any other information, or any witnesses or other authentication, may be required or requested, without approval of the court.

(i) *Return of Choice Form.* At the option of the person completing the choice form, the choice may be returned by mail, in person, or by messenger to any school in the school system or to the office of the Superintendent.

(j) *Choices not on Official Form.* The exercise of choice may also be made by the submission in like manner of any other writing which contains information sufficient to identify the student and indicates that he has made a choice of school.

(k) *Choice Forms Binding.* When a choice form has once been submitted and the choice period has expired, the choice is binding for the entire school year and may not be changed except in cases of parents making different choices from their children under the conditions set forth in paragraph II (a) of this decree and in exceptional cases where, absent the consideration of race, a change is educationally called for or where compelling hardship is shown by the student. A change in family residence from one neighborhood to another shall be considered an exceptional case for purposes of this paragraph.

(l) *Preference in Assignment.* In assigning students to schools, no preferences shall be given to any student for prior attendance at a school and, except with the approval of court in extraordinary circumstances, no choice shall be denied for any reason other than overcrowding. In case of overcrowding at any school, preference shall be given on the basis of the proximity of the school to the homes of the students choosing it, without regard to race or color. Standards for determining overcrowding shall be applied uniformly throughout the system.

(m) *Second Choice where First Choice is Denied.* Any student whose choice is denied must be promptly notified in writing and given his choice of any school in the school system serving his grade level where space is available. The student shall have seven days from the receipt of notice of a denial of first choice in which to exercise a second choice.

(n) *Transportation.* Where transportation is generally provided, buses must be routed to the maximum extent feasible in light of the geographic distribution of students, so as to serve each student choosing any school in the system. Every student choosing either the formerly white or the formerly Negro school nearest his residence must be transported to the school to which he is assigned under these provisions, whether or not it is his first choice, if that school is sufficiently distant from his home to make him eligible for transportation under generally applicable transportation rules.

(o) *Officials not to Influence Choice.* At no time shall any official, teacher, or employee of the school system influence any parent, or other adult person serving as a parent, or any student, in the exercise of a choice or favor or penalize any person because of a choice made. If the defendant school board employs professional guidance counselors, such persons shall base their guidance and counselling on the individual student's particular personal, academic, and vocational needs. Such guidance and counselling by teachers as well as professional guidance counsellors shall be available to all students without regard to race or color.

(p) *Protection of Persons Exercising Choice.* Within their authority school officials are responsible for the protection of persons exercising rights under or otherwise affected by this decree. They shall, without delay, take appropriate action with regard to any student or staff member who interferes with the successful operation of the plan. Such interference shall include harassment, intimidation, threats, hostile words or acts, and similar behavior. The school board shall not publish, allow, or cause to be published, the names or addresses of pupils exercising rights or otherwise affected by this decree. If officials of the school system are not able to provide sufficient protection, they shall seek whatever assistance is necessary from other appropriate officials.

III—PROSPECTIVE STUDENTS

Each prospective new student shall be required to exercise a choice of schools before or at the time of enrollment. All such students known to defendants shall be furnished a copy of the prescribed letter to parents, and choice form, by mail or in person, on the date the choice period opens or as soon thereafter as the school system learns that he plans to enroll. Where there is no pre-registration procedure for newly entering students, copies of the choice forms shall be available at the Office of the Superintendent and at each school during the time the school is usually open.

IV—TRANSFERS

(a) *Transfers for Students.* Any student shall have the right at the beginning of a new term, to transfer to any school from which he was excluded or would otherwise be excluded on account of his race or color.

(b) *Transfers for Special Needs.* Any student who requires a course of study not offered at the school to which he has been assigned may be permitted, upon his written application, at the beginning of any school term or semester, to transfer to another school which offers courses for his special needs.

(c) *Transfers to Special Classes or Schools.* If the defendants operate and maintain special classes or schools for physically handicapped, mentally retarded, or gifted children, the defendants may assign children to such schools or classes on a basis related to the function of the special class or school that is other than freedom of choice. In no event shall such assignments be made on the basis of race or color or in a manner which tends to perpetuate a dual school system based on race or color.

V—SERVICES, FACILITIES, ACTIVITIES AND PROGRAMS

No student shall be segregated or discriminated against on account of race or color in any service, facility, activity, or program (including transportation, athletics, or other extracurricular activity) that may be conducted or sponsored by the school in which he is enrolled. A student attending school for the first time on a desegregated basis may not be subject to any disqualification or waiting period for participation in activities and programs, including athletics, which might otherwise apply because he is a transfer or newly assigned student except that such transferees shall be subject to longstanding, non-racially based rules of city, county, or state athletic associations dealing with the eligibility of transfer students for athletic contests. All school use or school-sponsored use of athletic fields, meeting rooms, and all other school related services, facilities, activities, and programs such as commencement exercises and parent-teacher meetings which are open to persons other than enrolled students, shall be open to all persons without regard to race or color. All special educational programs conducted by the defendants shall be conducted without regard to race or color.

VI—SCHOOL EQUALIZATION

(a) *Inferior Schools.* In schools heretofore maintained for Negro students, the defendants shall take prompt steps necessary to provide physical facilities, equipment, courses of instruction, and instructional materials of quality equal to that provided in schools previously maintained for white students. Conditions of overcrowding, as determined by pupil-teacher ratios and pupil-classroom ratios shall, to the extent feasible, be distributed evenly between schools formerly maintained for Negro students and those formerly maintained for white students. If for any reason it is not feasible to improve sufficiently any school formerly miantained for Negro students, where such improvement would otherwise be required by this paragraph, such school shall be closed as soon as possible, and students enrolled in the school shall be reassigned on the basis of freedom of choice. By October of each year, defendants shall report to the Clerk of the Court pupil-teacher ratios, pupil-classroom ratios, and per-pupil expenditures both as to operating and capital improvement costs, and shall outline the steps to be taken and the time within which they shall accomplish the equalization of such schools.

(b) *Remedial Programs.* The defendants shall provide remedial education programs which permit students attending or who have previously attended segregated schools to overcome past inadequacies in their education.

VII—New Construction

The defendants, to the extent consistent with the proper operation of the school system as a whole, shall locate any new school and substantially expand any existing schools with the objective of eradicating the vestiges of the dual system.

VIII—Faculty and Staff

(a) *Faculty Employment.* Race or color shall not be a factor in the hiring, assignment, reassignment, promotion, demotion, or dismissal of teachers and other professional staff members, including student teachers, except that race may be taken into account for the purpose of counteracting or correcting the effect of the segregated assignment of faulty and staff in the dual system. Teachers, principals, and staff members shall be assigned to schools so that the faculty and staff is not composed exclusively of members of one race. Wherever possible, teachers shall be assigned so that more than one teacher of the minority race (white or Negro) shall be on a desegregated faculty. Defendants shall take positive and affirmative steps to accomplish the desegregation of their school faculties and to achieve substantial desegregation of faculties in as many of the schools as possible for the 1967–68 school year notwithstanding that teacher contracts for the 1967–68 or 1968–69 school years may have already been signed and approved. The tenure of teachers in the system shall not be used as an excuse for failure to comply with this provision. The defendants shall establish as an objective that the pattern of teacher assignment to any particular school not be identifiable as tailored for a heavy concentration of either Negro or white pupils in the school.

(b) *Dismissals.* Teachers and other professional staff members may not be discriminatorily assigned, dismissed, demoted, or passed over for retention, promotion, or rehiring, on the ground of race or color. In any instance where one or more teachers or other professional staff members are to be displaced as a result of desegregation, no staff vacancy in the school system shall be filled through recruitment from outside the system unless no such displaced staff member is qualified to fill the vacancy. If as a result of desegregation, there is to be a reduction in the total professional staff of the school system, the qualifications of all staff members in the system shall be evaluated in selecting the staff member to be released without consideration of race or color. A report containing any such proposed dismissals, and the reasons therefor, shall be filed with the Clerk of the Court, serving copies upon opposing counsel, within five (5) days after such dismissal, demotion, etc., as proposed.

(c) *Past Assignments.* The defendants shall take steps to assign and reassign teachers and other professional staff members to eliminate the effects of the dual school system.

IX—Reports to the Court

(1) *Report on Choice Period.* The defendants shall serve upon the opposing parties and file with the Clerk of the Court on or before April 15, 1967, and on or before June 15, 1967, and in each subsequent year on or before June 1, a report tabulating by race the number of choice applications and transfer applications received for enrollment in each grade in each school in the system, and the number of choices and transfers granted and the number of denials in each grade of each school. The report shall also state any reasons relied upon in denying choice and shall tabulate, by school and by race of student, the number of choices and transfers denied for each such reason.

In addition, the report shall show the percentage of pupils actually transferred or assigned from segregated grades or to schools attended predominantly by pupils of a race other than the race of the applicant, for attendance during the 1966–67 school year, with comparable data for the 1965–66 school year. Such additional information shall be included in the report served upon opposing counsel and filed with the Clerk of the Court.

(2) *Report After School Opening.* The defendants shall, in addition to reports elsewhere described, serve upon opposing counsel and file with the Clerk of the Court within 15 days after the opening of schools for the fall semester of each year, a report setting forth the following information:

(i) The name, address, grade, school of choice and school of present attendance of each student who has withdrawn or requested withdrawal of his choice of school or who has transferred after the start of the school year, together with a description of any action taken by the defendants on his request and the reasons therefor.

(ii) The number of faculty vacancies, by school, that have occurred or been filled by the defendants since the order of this Court or the latest report submitted pursuant to this subparagraph. This report shall state the race of the teacher employed to fill each such vacancy and indicate whether such teacher is newly employed or was transferred from within the system. The tabulation of the number of transfers within the system shall indicate the schools from which and to which the transfers were made. The report shall also set forth the number of faculty members of each race assigned to each school for the current year.

(iii) The number of students by race, in each grade of each school.

EXPLANATORY LETTER

(School System Name and Office Address)

(Date Sent)

Dear Parent:

All grades in our school system will be desegregated next year. Any student who will be entering one of these grades next year may choose to attend any school in our system, regardless of whether that school was formerly all-white or all-Negro. It does not matter which school your child is attending this year. You and your child may select any school you wish.

Every student, white and Negro, must make a choice of schools. If a child is entering the ninth or higher grade, or if the child is fifteen years old or older, he may make the choice himself. Otherwise a parent or other adult serving as parent must sign the choice form. A child enrolling in the school system for the first time must make a choice of schools before or at the time of his enrollment.

The form on which the choice should be made is attached to this letter. It should be completed and returned by June 1, 1967. You may mail it in the enclosed envelope, or deliver it by messenger or by hand to any school principal or to the Office of the Superintendent at any time between May 1 and June 1. No one may require you to return your choice form before June 1 and no preference is given for returning the choice form early.

No principal, teacher or other school official is permitted to influence anyone in making a choice or to require early return of the choice form. No one is permitted to favor or penalize any student or other person because of a choice made. A choice once made cannot be changed except for serious hardship.

No child will be denied his choice unless for reasons of overcrowding at the school chosen, in which case children living nearest the school will have preference.

Transportation will be provided, if reasonably possible, no matter what school is chosen. [Delete if the school system does not provide transportation.]

Your School Board and the school staff will do everything we can to see to it that the rights of all students are protected and that desegregation of our schools is carried out successfully.

Sincerely yours,

Superintendent.

CHOICE FORM

This form is provided for you to choose a school for your child to attend next year. You have 30 days to make your choice. It does not matter which school your child attended last year, and does not matter which school your child attended last year, and does not matter whether the school you choose was formerly a white or Negro school. This form must be mailed or brought to the principal of any school in the system or to the office of the Superintendent, [address], by June 1, 1967. A choice is required for each child.

Name of child ____

(Last) (First) (Middle)

Address ____

Name of Parent or other

adult serving as parent ____

If child is entering first grade, date of birth:

____

(Month) (Day) (Year)

Grade child is entering ____

School attended last year ____

Choose one of the following schools by marking an X beside the name.

Name of School	Grade	Location

Signature ____

Date ____

____

____

To be filled in by Superintendent School Assigned[1] __________

School Assigned[1] __________

GEWIN, Circuit Judge, with whom GRIFFIN B. BELL, Circuit Judge, concurs (dissenting):

The opinion of the majority and the proposed decree are long, complicated, somewhat ambiguous and rather confusing. The per curiam opinion of the majority of the en banc court does not substantially clarify, modify or change anything said in the original opinion filed December 29, 1966. Only minor and inconsequential changes were made in the proposed decree.[1] In my view both the opinion and decree constitute an abrupt and unauthorized departure from the mainstream of judicial thought both of this Circuit and a number of other Circuits. I am unable to agree either with the opinion or the decree, especially those provisions dealing with the following: (1) de facto and de jure segregation; (2) the guidelines; (3) the proposed decree; (4) attendance percentages, proportions, and freedom of choice; and (5) enforced integration.

I—DE FACTO AND DE JURE SEGREGATION

The thesis of the majority, like Minerva (Athena) of the classic myths,[2] was spawned full-grown and full-armed. It has no substantial legal ancestors. We must wait to see what progeny it will produce.

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[1] In subsequent years the dates in both the explanatory letter and the choice from should be changed be changed to conform to the choice period.

[1] "The opinion" and "the decree" as used herein refer to the opinion and decree filed in these cases by the three judge panel on December 29, 1966, wherein two of the judges agreed and one dissented. Of necessity, references to page numbers of the opinion refer to the slip opinion.

[2] See Gaylley, The Classic Myths, (Rev. ed. 1939) page 23:

"She sprang from the brain of Jove, agleam with panoply of war, brandishing a spear and with her battle-cry awakening the echoes of heaven and earth."

While professing to fashion a remedy under the benevolent canopy of the Federal Constitution, the opinion and the decree are couched in divisive terms and proceed to dichotomize the union of states into two separate and distinct parts. Based on such reasoning the Civil Rights Act of 1964 is stripped of its national character, the national policies therein stated are nullified, and in effect, the remedial purposes of the Act are held to apply to approximately one-third of the states of the union and to a much smaller percentage or proportion of the total population of the country. I am unable to believe that the Congress had any such intent. If it did, a serious constitutional question would be presented as to the validity of the entire Act under our concepts of American constitutional government.

The Negro children in Cleveland, Los Angeles, Boston, New York, or any other area of the nation which the opinion classifies under de facto segregation, would receive little comfort from the assertion that the racial mak-up of their school system does not violate their constitutional rights because they were born into a de facto society, while the exact same racial make-up of the school system in the 17 Southern and border states violates the constitutional rights of their counterparts, or even their blood brothers, because they were born into a de jure society. All children everywhere in the nation are protected by the Constitution, and treatment which violates their constitutional rights in one area of the country, also violates such constitutional rights in another area. The details of the remedy to be applied, however, may vary with local conditions. Basically, all of them must be given the same constitutional protection. Due process and equal proection will not tolerate a lower standard, and surely not a double standard. The problem is a national one.

Regardless of our decrees, in spite of our hopes and notwithstanding our disappointments, there is no infallible and certain process of alchemy which will erase decades of history and transmute a distasteful set of circumstances into a utopia of perfection. All who have studied the subject recognize that discriminatory practices did not arise from a single cause. Such practices had their origin and birth in social, economic, educational, legal, geographical and numerous other considerations. These factors tend to be self-perpetuating. We must eradicate them, and I have the faith that they will be eradicated and eliminated by responsible and responsive governmental agencies acting pursuant to the best interests of the community. There is no social antibiotic which will effect a sudden or overnight cure. It is not possible to specifically fix the blame or to attribute the origin of discriminatory practices to isolated causes, and it is surely inappropriate to undertake to fasten guilt upon any segment of the population. In this area of our nation's history eminent historians still disagree as to causes and effects. Some studies have placed emphasis on the slave trader or the importer of slaves, others have blamed the slave holder, while others have tried to trace the guilt back to tribal chieftains in Africa. Perhaps the most

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However, compare the doctrine of the majority and the theme of an article in the Virginia Law Review entitled "Title VI, The Guidelines and School Desegregation in the South", by James R. Dunn, Virginia Law Review, Vol. 53, page 42 (1967). According to footnote 85 of the law review article, the majority opinion was released "as this article was going to press." Mr. Dunn is Legal Adviser, Equal Educational Opportunities Program, United States Office of Education, HEW, Washington, D.C.

common understanding amongst all the historians and students of the problem is the conclusion that causes cannot be isolated and responsibility cannot be limited to a particular group. Whatever the cause or explanation, it is clear that the responsibility rests on many rather than few.

At this time, almost 13 years after the decisions in Brown v. Board of Education (1954) 347 U.S. 483, 74 S.Ct. 686, 98 L. Ed. 873 (*Brown I*) and Brown v. Board of Education (1955) 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (*Brown II*), there should be no doubt in the minds of anyone that compulsory segregation in the public school systems of this nation must be eliminated. Negro children have a personal, present, and unqualified constitutional right to attend the public schools on a racially non-discriminatory basis.

Although espousing the cause of uniformity and asserting there must not be one law for Athens and another for Rome, the opinion does not follow that thesis or principle. One of the chief difficulties which I encounter with the opinion is that it concludes that the Constitution means one thing in 17 states of the nation and something else in the remaining states. This is done by a rather ingenious though illogical distinction between the terms de facto segregation and de jure segregation. While the opinion recognizes the evils common to both types, it relies heavily on background facts to justify the conclusion that the evil will be corrected in one area of the nation and not in the other. In my view the Constitution cannot be bent and twisted in such a manner as to justify or support such an incongruous result. The very subject matter under consideration tends to nullify the assertion that the constitutional prohibition against segregation should be applied in 17 states and not in the rest of the nation.

Legislative history clearly supports the idea that no distinction should be made with respect to the various states in dealing with the problem. Senator Pastore was one of the principal spokesmen who handled this legislation. He gave the following explanation:

> "Frankly I do not see how we could have gone any further, to be fair * * * Section 602 of Title VI, not only requires the agency to promulgate rules and regulations, but all procedure must be in accord with these rules and regulations. They must have broad scope. They must be national. They must apply to all fifty states. We could not draw one rule to apply to the State of Mississippi, another rule to apply to the State of Alabama, and another rule to apply to the State of Rhode Island. There must be only one rule, to apply to every state. Further, the President must approve the rule." (110 Cong. Rec. 7059, April 7, 1964)

* * * * * * *

> "Mr. Pastore. * * * We must do what Title VI provides; and we could do it in no milder form than that now provided by Title VI. The Senator from Tennessee says, 'Let us read this title.' I say so, too. When we read these two pages, we understand that the whole philosophy of Title VI is to promote voluntary compliance. It is written right in the law. There shall be the voluntary compliance as the first step, and then the second step they must inaugurate and promulgate, rules that have a national effect, not a local effect. They shall apply to Tennessee, to Louisiana, to Rhode Island, in equal fashion." (110 Con. Rec. 7066, April 7, 1964.

In connection with the distinction which the opinion undertakes to make, it is pertinent to observe the following strong and unequivocal pronouncement in the very beginning of the decision in *Brown II:*

> "All provisions of *federal, state, or local* law requiring or permitting such discrimination must yield to this principle. There remains for consideration the manner in which relief is to be accorded." (Emphasis added) (page 298, 75 S.Ct. page 755)

It should be observed that all public school segregation was de jure in the broad sense of that term prior to the first *Brown* decision, in that segregation was permitted, if not required, by law.

It is undoubtedly true that any problem which reaches national proportions is often generated by varying and different customs, mores, laws, habits and manners. Such differences in the causes which contributed to the creation and existence of the problem in the first instance, do not justify the application of a fundamental constitutional principle in one area of the nation and a failure to apply it in another.

While all the authorities recognize the existence and operation of different causes in the historical background of racial segregation, there are also marked similarities. This fact is noted in the recently released study by the United States Commission on Civil Rights, Racial Isolation in the Schools, 1967, Vol. I (pp. 39, 59–79). In discussing the subject the following observation is made early in the report:

> "Today it [racial isolation or segregation] is attributable to remnants of the dual school system, methods of student assignment, residential segregation, and to those discretionary decisions *familiar in the North*—site selection, school construction, transfers, and the determination of where to place students in the event of overcrowding." (Emphasis added)

In its summary the Commission notes that the causes of racial isolation or school segregation are complex and self-perpetuating. It speaks of the *Nation's* metropolitan areas and refers to social and economic factors as well as geographical ones. According to the summary, not only do *state* and *local* governments share the blame, it is categorically asserted that "The *Federal Government* also shares in this responsibility." (Emphasis added) Pertinent similarities in the problem, applicable to the entire nation, are forcefully asserted in the final sentence of the Commission's Summary:

> "*In the North,* where school segregation was not generally compelled by law, these [discriminatory] policies and practices have helped to increase racial separation. *In the South,* where until the Brown decision in 1954 school segregation was required by law, *similar policies and practices* have contributed to its perpetuation." (Emphasis added)

By a process of syllogistic reasoning based on fatally defective major premises the opinion has distorted the meaning of the term segregation and has segmented its meaning into de facto and de jure segregation. All segregation in the South is classified as de jure [4] while segregation in the North is classified as de facto. Different rules apply to the different types of segregation. The South is heavily condemned. The opinion approaches the problem on a sectional basis and fails to consider the subject except on a sectional or regional basis. There are many references to "the eleven" Southern states and the "the seven" border states. This area of the nation is variously charactertized as "The eleven states of the Confederacy," "the entire region encompassing the southern and border states", "wearing the badge of slavery", and "apartheid". Finally, the opinion concludes that the two types of segregation are different, have different origins, create different problems and require different corrective action. It is suggested that there is no present remedy for de facto segregation but that the problems and questions arising from de facto segregation may someday be answered by the Supreme Court.[5]

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[4] At one place in the opinion *pseudo* de facto segregation in the South is mentioned, but it is asserted that any similarity between pseudo de facto segregation in the South and actual de facto segregation in the North is more apparent than real (p. 68).

cases the Court clearly and wisely recognized the fact that those decisions had changed the law which had been in effect for decades. Due notice was taken of the fact that the new order of the day would "involve a variety of local problems." The court recognized "the complexi-

This Court, and the district courts within the six states embraced within our jurisdiction like many other federal courts of the nation have given much time and attention to the solution of the problems arising after the *Brown* decisions. Much has been accomplished, much remains to be done. It is not possible for me to join in the expressions of pessimism contained in the opinion or to approve the insinuations that the courts have failed in the performance of their duty.[6] Even Congress is taken to task for failure to act earlier and for failure to recognize school desegregation "as the law of the land." [7] In the *Brown* ties arising from the transition to a system of public education freed of racial discrimination." Moreover, the Court stated, "Full implementation of these constitutional principles may require solution of varied local school problems." The courts were instructed to be "guided by equitable principles," to give consideration to "practical flexibility in shaping remedies" and observed that equity courts have a peculiar "facility for adjusting and reconciling public and private needs." The *Brown* decisions emphasized the concept that courts of equity are particularly qualified to shape such remedies as would "call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles" pronounced in the first *Brown* decision. Contrary to the tone and expressions of the majority opinion, the Supreme Court early announced the policy of heavy reliance on the district courts and that policy has continued to this date.

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[5] The case of Blocker v. Bd. of Educ. of Manhasset, N.Y. (E.D.N.Y. 1964) 226 F. Supp. 208 cited and relied on by the majority does not support the de facto de jure distinction. In fact Judge Zavatt disavows any such distinction. The following is from the opinion:

"On the facts of this case, the separation of the Negro elementary school children is segregation. It is segregation by law—the law of the School Board. In the light of the existing facts, the continuance of the defendant Board's impenetrable attendance lines amounts to nothing less than state imposed segregation."

* * * * * * *

"This segregation is attributable to the State. The prohibitions of the Fourteenth Amendment 'have reference to actions of the political body dominated a State, by whatever instruments or in whatever modes that action may be taken. * * * Whoever, by virtue of public position under a State government, * * * takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.' Ex Parte Virginia, 100 U.S. 339, 346-347, 25 L.Ed. 676, 679 (1880). 'The situation here is in no different posture because the members of the School Board and the Superintendent of Schools are local officials; from the point of view of the Fourteenth Amendment they stand in this litigation as the agents of the State.' Cooper v. Aaron, supra, 358 U.S. [1], at 16, 78 S.Ct. [1401], at 1408, 3 L.Ed.2d 5."

[6] See for example the following statements from the opinion:

"The courts acting alone have failed." (p. 847 of 372 F.2d).

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"Quantitatively, the results were meager." (p. 853)

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"And most judges do not have sufficient competence—they are not educators or school administrators—to know the right questions, much less the right answers." (p. 855)

* * * * * * *

"In some cases there has been a substantial time-lag between this Court's opinions and their applications by the district courts. In certain cases—which we consider unnecessary to cite—there has even been a manifest variance between this Court's decision and a later district court decision. A number of district courts still mistakenly assume that transfers under Pupil Placement Laws—superimposed on unconstitutional initial assignment satisfy the requirements of a desegregation plan." (p. 860)

[7] See item (5), page 855 of the opinion:

"(5) But one reason more than any other has held back desegregation of public schools on a large scale. This has been the lack, until 1964, of effective congressional statutory recognition of school desegregation as the law of the land."

II—Guidelines

With respect to the guidelines, it should be noted that they were not an issue presented to the District Court. The cases here involved had been tried in the respective district courts, appeals taken to this Court and were pending on the docket of this Court before the 1966 Guidelines were promulgated. Guidelines were not made an issue by the pleadings or otherwise in the district courts and no evidence was taken with respect to them. The issue of the guidelines are before this Court because the Court, sua sponte, brought the issue before it.[8] In my view their validity is not an issue to be decided in this Court. See United States v. Petrillo (1947) 332 U.S. 1, 5, 6, 67 S.Ct. 1538, 91 L.Ed. 1877; United States v. International Union (1957) 352 U.S. 567, 590, 77 S.Ct. 529, 1 L.Ed.2d 563; Connor v. New York Times (5 Cir. 1962) 310 F.2d 133, 135; Gibbs v. Blackwell (5 Cir. 1965) 354 F.2d 469, 471.

In its first approach to the question the Court indicated that it would not pass upon the constitutionality of the guidelines but would give weight to or rely upon them as a matter of judicial policy. When confronted with the fact that the guidelines were not approved by the President as required by the Civil Rights Act of 1964, the opinion then concluded that they do not constitute or purport to be rules or regulations or orders of general application. It was then stated that since they were not a rule, regulation or order, they constitute "a statement of policy", and while HEW "is under no statutory compulsion to issue such statements" it was decided that it is "of manifest advantage" to the general public to know the basic considerations which the Commissioner uses "in determining whether a school meets the requirements for eligibility to receive financial assistance." Immediately the opinion recognizes the inherent unfairness and vices of such pronouncements of administrative policy without an evidentiary hearing. "The guidelines have the vices of all administrative policies established unilaterally without a hearing."[9] Finally, the opinion concludes that the guidelines are fully constitutional, recognizing as it is bound to do, that a failure to comply with them cuts the purse strings and closes the treasury to all who fail to comply:

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[8] See opinion, page 848 of 372 F.2d, footnote 13.

It should be noted that when the panel which originally heard this case invited briefs no mention was made of any constitutional question or issue with respect to the HEW guidelines. Rather, the questions posed related to whether it was "permissible and desirable" for the court to give weight to or rely on the guidelines; and if so, what practical means or methods should be employed in making use of the guidelines. From the questions raised by the court, counsel could not have gained the impression that the court was to make a full scale determination of the constitutional questions involved.

[9] See opinion page 857.

> "The great bulk of the school districts in this circuit have applied for federal financial assistance and therefore operate under voluntary desegregation plans. Approval of these plans by the Office of Education qualifies the schools for federal aid. *In this opinion we have held that the HEW Guidelines now in effect are constitutional and are within the statutory authority created in the Civil Rights Act of 1964*. Schools therefore, in compliance with the Guidelines can in general be regarded as discharging constitutional obligations." (Emphasis added) (p. 894)

Whether viewed from a substantive or procedural point of view, due process and sound judicial administration require, at the very least, an evidentiary hearing on a matter so vital to so many people.[10] Not only are numerous people affected, but those most affected are the school children of the nation. The most vital segment of our democratic society is our school system. The operation and administration of the public school systems of this nation are essentially a local business. It is unthinkable that matters that so vitally affect this phase of the national welfare should be decided in such summary fashion. In the two most recent pronouncements by the Supreme Court dealing with the problem of segregation as related to faculty and staff, that Court refused to act without an evidentiary hearing. In both decisions the cases were remanded to the district court "for evidentiary hearings." Bradley v. School Bd., City of Richmond (1965) 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187; Rogers v. Paul (1965) 382 U.S. 198, 86 S.Ct. 358, 15 L.Ed.2d 265. Similarly, in Calhoun v. Latimer (1964) 377 U.S. 263, 84 S.Ct. 1235, 12 L.Ed.2d 288, the Court had for consideration a desegregation plan of the Atlanta Board of Education. During the argument before the Supreme Court counsel for the Board of Education informed the Court that subsequent to the decision of the lower court, the Board had adopted additional provisions authorizing "free transfers with certain limitations in the city high schools". The petitioners contended that the changes did not meet constitutional standards and asserted that with respect to elementary students the changed plan would not achieve desegregation until sometime in the 1970's. The Supreme Court did not "grasp the nettle" but vacated the order of the lower court and remanded the case to "be appraised by the District Court in a *proper evidentiary hearing*." (Emphasis added)

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[10] The 1966 Guidelines were promulgated on March 7, 1966, after these cases were docketed in this Court. The fact that the appellees had no opportunity to have a hearing and that the guidelines were unilaterally issued without receipt of evidence from the numerous school districts was called to the attention of this Court by one of the briefs for appellees:

"As pointed out in detail below, the Constitutional and legislative principles applicable to the expenditures of federal funds, the legislative and administrative discretion placing conditions upon the receipt and use thereof, the lack of due process in the adoption thereof and the lack of any opportunity to be heard by those affected thereby all render such Guidelines inapplicable to the pending cases."

* * * * * * *

"The 1966 Guidelines (as well as the 1965 Guidelines) were not approved by the President. They were issued by the Office of Education unilaterally without an opportunity for the representatives of the thousands of school districts affected thereby to be heard. As unilateral directives they have not been subject to judicial review."

See consolidated brief Jefferson County Board of Education, pp. 76–77.

III—Decree

I now come to a consideration of the decree ordered to be entered and its relation to the opinion. It is impossible to consider the decree and the opinion separately; they are inextricably interwoven. Neither takes into account "multifarious local difficulties", and therefore, any particular or peculiar local problems are submerged and sacrificed to the apparent determination, evident on the face of both the opinion and the decree, to achieve percentage enrollments which will reflect the kind of racial balance the opinion seeks to achieve.

The opinion asserts that uniformity must be achieved forthwith in everyone of the six states embraced within the Fifth Circuit. No consideration is given to any distinction in any of the numerous school systems involved. Urban schools, rural ones, small schools, large ones, areas where racial imbalance is large or small, the relative number of Negro and white children in any particular area, or any of the other myriad problems which are known to every school administrator, are taken into account. All things must yield to speed, uniformity, percentages and proportional representation. There are no limitations and there are no excuses. This philosophy does not comport with the philosophy which has guided and been inherent in the segregation problem since *Brown II*. As the Court there stated:

> "Because these cases arose under *different local conditions* and their disposition will involve a variety *of local problems*, we required further *argument* on the question of relief." (349 U.S. p. 298, 75 S.Ct. p. 755) (Emphasis added)

See also Davis v. Bd. of School Comm'rs of Mobile Co., Ala., 322 F.2d 356 (5 Cir, 1963) wherein this Court made a distinction in the rural and urban schools of Mobile County, Alabama. We held:

> "The District Court may modify this order to defer desegregation of rural schools in Mobile County until September 1964, should the District Court after further hearing conclude that special planning of administrative problems for rural schools in the county make it impracticable for such schools to start desegregation in September 1963."

The effectiveness of the district courts has been seriously impaired, in a real sense, contrary to the teachings of all the decisions of the Supreme Court since *Brown II*. Under the opinion and decree a United States District Judge serves essentially as a referee master, or hearing examiner. Now his only functions are to order the enforcement of the detailed, uniform, stereotyped formal decree, to supervise compliance with its detailed provisions as therein ordered and directed, and to receive periodic reports much in the same fashion as reports are received by an ordinary clerk in a large business establishment.

Such a detailed decree on the appellate level not only violates sound concepts of judicial administration, but it violates a longstanding philosophy of the federal judicial system, and indeed all judicial systems common to this country, which vest wide discretion and authority in trial courts because of their closensss to and familiarity with local problems. See the opinions in *Brown II*, *Bradley*, *Rogers*, and *Calhoun*. For example, in *Brown II* the Court stated:

> "Full implementation of these constitutional principles may require solution of *varied local school* problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of the school authorities constitutes good faith implementation of the governing constitutional principles. Because of *their proximity to local conditions* and the possible need for further hearings, *the courts which originally heard these cases can best perform this judicial appraisal*. Accordingly, we believe it appropriate to remand the cases to those courts.
>
> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been *characterized by a practical flexibility* in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of *these traditional attributes of equity power*. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a *variety of obstacles* in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision." (Emphasis added.)

The opinion asserts that "most judges" do not possess the necessary competence to deal with the questions presented, and do not "know the right questions, much less the right answers." Notwithstanding the foregoing assertion, the judges of the majority, acting on the appellate level, proceed to fashion a decree of such minute detail and specificity as to remove all discretion and authority from the district judges on whom the Supreme Court has relied so heavily. In my view the district judges are in much better position to know the questions and the answers than appellate judges who necessarily function some distance away from an evidentiary hearing and are removed from the "multifarious local problems" and "the variety of obstacles" inherent in the solution of the issues presented.

IV—PERCENTAGES, PROPORTIONS AND FREEDOM OF CHOICE

Freedom of choice means the unrestricted, uninhibited, unrestrained, unhurried, and unharried right to choose where a student will attend public school subject only to administrative considerations which do not take into account or are not related to considerations of race. If there is a free choice, free in every sense of the word, exercised by students or by their parents, or by both, depending on the circumstances, in accordance with a plan fairly and justly administered for the purpose of eliminating segregation, the dual school system as such will ultimately disappear. Goss v. Board of Education, 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632 (1963); Bradley v. School Board, 345 F.2d 310, 318 (4 Cir. 1965), vacated and remanded on other grounds, 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187 (1965 per curiam). See also Clark v. Board of Educ. of Little Rock, 369 F.2d 661 (8 Cir. 1966); Deal v. Cincinnati Bd. of Educ., 369 F.2d 55, 59 (6 Cir. 1966); Lee et al. v. Macon County Board of Education et al. (D.C.M.D.Ala.

1967) 267 F.Supp. 458. If the completely free choice is afforded and neither the students nor their parents desire to change the schools the students have heretofore attended, this Court is without authority under the Constitution or any enactment of Congress to compel them to make a change. Implicit in freedom of choice is the right to choose to remain in a particular school, perhaps the school heretofore attended. That it itself is the exercise of a free choice. The fact that Negro children may not choose to leave their associates, friends, or members of their families to attend a school where those associates are eliminated does not mean that freedom of choice does not work or is not effectively afforded. The assertion by the majority that "[t]he only school desegregation plan that meets Constitutional standards is one that works" as interpreted by that opinion, simply means that students and parents will not be given a free choice if the results envisioned by the majority are not actually achieved. There must be a mixing of the races according to majority philosophy even if such mixing can only be achieved under the lash of compulsion. If the percentage of Negro and white children attending a particular school does not conform to the percentage of Negro and white school population prevalent in the community, the majority concludes that the plan of desegregation does not work. Accordingly, while professing to vouchsafe freedom and liberty to Negro children, they have destroyed the freedom and liberty of all students, Negro and white alike. There must be a mixing of the races, or integration at all costs, or the plan does not work according to the opinion. Such has not been and is not now the spirit or the letter of the law.

Further the Court equates the percentage attendance test with percentages in jury exclusion cases[11] cases and voter registration cases. It should be pointed out that such cases had no element of free choice in them, and therefore, the comparison is inapposite. In the instant cases the majority condemns a free choice plan unless it acheives the percentage result which suits the majority. Accordingly, the opinion concludes:

> "Percentages have been used in other civil rights cases. A similar inference may be drawn in school desegregation cases, when the number of Negroes attending school with white children is manifestly out of line with the ratio of Negro school children to white school children in public schools. Common sense suggests that a gross discrepancy between the ratio of Negroes to white children in a school and the HEW percentage guides raises an inference that the school plan is not working as it should in providing a unitary, integrated system."

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[11] One of the leading and most recent cases on jury exclusion is Swain v. State of Alabama (1965) 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759. With respect to proportional representation on juries the Court concluded:

> "Venires drawn from the jury box made up in this manner unquestionably contained a smaller proportion of the Negro community than of the white community. But a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which the petit jurors are drawn." (p. 208, 85 S.Ct. p. 829.)

Further, the Court in Swain quoted with approval the following statement from Cassell v. State of Texas, 339 U.S. 282, 286–287, 70 S.Ct. 629, 631, 94 L. Ed. 839, 847:

> "Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation. Similarly, since there can be no exclusion of Negroes as a race and no discrimination because of color, proportional limitation is not permissible."

There is no constitutional requirement of proportional representation in the schools according to race. Furthermore, since there can be no exclusion based on race, proportional limitation is likewise impermissible under the Constitution.

The aim and attitude of the majority is reflected by the following statement:

> "In reviewing the effectiveness of an approved plan it seems reasonable to use some sort of yardstick or objective percentage guide. The percentage requirements in the Guidelines are modest, suggesting only that systems using free choice plans for at least two years should expect 15 to 18 per cent of the pupil population to have selected desegregated schools."

We should be concerned with the elimination of discrimination on account of race, and freedom of choice is one means of accomplishing that goal. It is not our function to condemn the children or the school authorities because the free choices actually made do not comport with our own notions of what the choices should have been. When our concepts as to proportions and percentages are imposed on school systems, notwithstanding free choices actualy made, we have destroyed freedom and liberty by judicial fiat; and even worse, we have done so in the very name of that liberty and freedom we so avidly claim to espouse and embrace. Our duty in seeking to eliminate racial discrimination is to vouchsafe to all children, regardless of race, a full, complete and timely free choice schools in appropriate cases in keeping with sound administrative practices which take into consideration proper criteria. Both proportional representation and proportional limitation are equally unconstitutional.

V—ENFORCED INTEGRATION

The opinion seeks to find a Congressional mandate requiring compulsory or enforced integration in the public schools as distinguished from the elimination of segregation. Throughout the opinion there appear a tangled conglomeration of words and phrases of various shades of meaning, all of which are equated with each other to reach the conclusion desired by the majority that school boards in this Circuit must adopt and implement a plan of forced integration.

It seems appropriate to return to the Civil Rights Act of 1964 and the legislative history which spawned its enactment in order to ascertain the true Congressional intent. Section 401(b), 42 U.S.C.A. § 2000c(b) defines desegregation in unequivocal terms:

> " 'Desgregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

Section 407(a)(2) of Title IV, Title 42 § 2000c–6(a)(2) provides as follows:

> "* * * provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such *racial balance, or otherwise*

> *enlarge the existing power of the court to insure compliance with constitutional standards.*" (Emphasis added)

It should be noted that the portion of the language of the proviso which is underscored is omitted in the court's opinion. As to enforced integration the following statement by Senator Humphrey is exactly in point:

> "Mr. Humphrey * * * I should like to make one further reference to the *Gary* case. This case makes it quite clear that while the Constitution prohibits segregation, it does not require integration * * *. The bill does not attempt to integrate the schools but it does attempt to eliminate segregation in the schools * * *. The fact that there is a racial imbalance per se is not something which is unconstitutional. That is why we have attempted to clarify it with the language of Section 4." (110 Congressional Record 12717)

Likewise with respect to Section 407 (a) (2) Senator Humphrey's statement clarifies and makes plain the Congressional intent by referring to the *Gary* case.[12]

The following additional excerpts from the legislative history serve to clarify the intent of Congress. Congressman Cellar, Chairman of the Judiciary Committee of the House and Floor Manager of the bill:

> "There is no authorization for either the Attorney General or the Commissioner of Education to work toward achieving racial balance in given schools." (110 Congressional Record 1519, January 31, 1964)

Senators Byrd and Humphrey:

> "Mr. BYRD of West Virginia. But would the Senator from Minnesota also indicate whether the words 'provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance' would preclude the Office of Education, under section 602 or Title VI, from establishing a requirement that schol boards and school districts shall take action to relieve racial imbalance wherever it may be deemed to exist?
>
> "Mr. HUMPHREY. Yes, I do not believe in duplicity. I believe that if we include the language in Title IV, it must apply throughout the Act." (110 Congressional Record, Page 12715, June 4, 1964).

Senator Javits:

> "Mr. JAVITS * * * Taking the case of the schools to which the Senator is referring, and the danger of envisaging the rule or regulation relating to racial imbalance, it is negated expressly in the bill, which would compel racial balance. Therefore there is no case in which the thrust of the statute under which the money would be given would be directed toward restoring or bringing about a racial balance in the schools. If such a rule were adopted or promulgated by a bureaucrat, and approved by the President, the Senator's State would have an open and shut case under Section 603. That is why we have provided for judicial review. The Senator knows as a lawyer that we never can stop anyone from

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[12] Bell v. School , City of Gary, Indiana, 213 F. Supp. 819 (D.C. 1963).

> suing, nor stop any Government official from making a fool of himself, or from trying to do something that he has no right to do, except by remedies provided by law. So I believe it is that set of words which is operative." (110 Congressional Record, Page 12717, June 4, 1964).

Senators Byrd and Humphrey:

> "Mr. Byrd of West Virginia * * *. Cannot the Office of Education, pursuant to carrying out this regulation, deny assistance to school districts wherein racial imbalance exists?
>
> Mr. Humphrey. Let me read from the substitute: Provided, that nothing herein shall empower any official or court of the United States to issue any order.
>
> Mr. Byrd of West Virginia. "To issue any order", but does it provide that the Office of Education shall not cut off Federal assistance?
>
> Mr. Humphrey. But in order to cut off Federal assistance, the President would have to issue the order, if the Senator will read Section 602.
>
> Mr. Byrd of West Virginia. The words are: No such rule, regulation, or order shall become effective unless and until approved by the president.
>
> Mr. Humphrey. That is correct.
>
> Mr. Byrd of West Virginia. What assurance does the Senator give me that the President will not approve such a requirement?
>
> Mr. Humphrey. Because I do not believe the President will violate the law." (110 Congressional Record, Page 12715, June 4, 1964).

In order to escape the clear meaning of the quoted statutes and the unquestioned intent of Congress as illustrated by the legislative history, the opinion summarily obliterates any distinction between degration means forced or enforced integration. Again the term integration is applied only to *de jure* segregated schools. An analysis of the opinion demonstrates that the process of reasoning used amounts to an unauthorized insertion of the word "de jure" to achieve and maintain the de facto and de jure distinction with which I dealt earlier. By means of this device the opinion converts the Civil Rights Act of 1964 into a new and different concept entirely foreign to its true meaning. I quote several typical excerpts from the opinion:

> "We use the terms 'integration' and 'desegregation' of formerly segregated public schools to mean the conversion of a *de jure* segregated dual system to a unitary, nonracial (nondiscriminatory) system—lock, stock, and barrel: students, faculty, staff, facilities, programs, and activities." (Emphasis added) (footnote 5, page 846 of 372 F.2d).

* * * * * * *

> "*The national policy is plain: formerly de jure segregated public school systems based on dual attendance zones must shift to unitary nonracial system—with or without federal funds.*" (Emphasis in orig.) (page 850).

* * * * * * *

> "Although the legislative history of the statute shows that the floor managers for the Act and other members of the Senate and

> House cited and *quoted these two opinions* they did so within the context of the problem of *de facto segregation.*" (Emphasis added.) (page 862). [The two cases mentioned are Briggs and Bell.]
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> * * * * * * *
>
> "As used in the Act, therefore, 'desegregation' refers only to the disestablishment of segregation *in de jure segregated schools.*" (Emphasis added) (page 878).
>
> * * * * * * *
>
> "Senator Humphrey spoke several times in the language of *Briggs* but his references to Bell indicate that the restrictions in the Act were pointed at the Gary, Indiana *de facto type of segregation.*" (Emphasis added) (page 881).

Again it should be said that it is not easy to understand the reasoning by which the majority concludes that the Federal Constitution requires integration of formerly *de jure* school systems but does not require the integration of de facto systems. Apparently faced with this dilemma the majority realized that it must challenge the jurisprudence established by Briggs v. Elliott (E.D.S.C. 1955) 132 F. Supp. 776, and Bell v. School City of Gary (N.D. Ind. 1963) 213 F. Supp. 819, affirmed 324 F. 2d 209 (7 Cir. 1963). The opinion refers to these cases as "two glosses on Brown." The repeated assertions of Senators showing their reliance upon the two decisions in question give emphasis to the meaning of the teaching of these two cases. Senator Humphrey actually stated that the thrust of Judge Beamer's opinion in the *Gary* case was incorporated into the Civil Rights Act of 1964.[13] The majority disposes of Senator Humphrey's comment and the *Gary* case by asserting that the school districts were drawn without regard to race. The following is from the opinion:

> "Senator Humphrey spoke several times in the language of *Briggs* but his references to Bell indicate that the restrictions in the Act were pointed at the Gary, Indiana de facto type of segregation." (opinion page 80).

While it may be true that the facts in *Gary* showed good faith on the part of the school board, it is likewise true that the Gary school system involved de jure segregation within the meaning of the majority opinion. We quote from Judge Beamer's opinion, 213 F. Supp. at 822:

> "Prior to 1949, Gary had segregated schools in what is commonly known as the Pulaski Complex. Two schools were built on the same campus, one was called Pulaski-East and the other Pulaski-west. One was occupied by Negro students and the other by white students. This was in accordance with the separate but equal policy, then permitted by Indiana law (Burns Indiana Statutes Annotated, 1948 Replacement, Section 28–5104)."

The difficulty of the majority is further increased by virtue of the fact that Judge Beamer cited cases which uphold the *Briggs* doctrine. More important, when the case was affirmed by the Court of Appeals of the Seventh Circuit, the so-called *Briggs* dictum was cited as authority for the court's holdings, 324 F. 2d at 213.

If the alleged *Briggs* dictum is so clearly erroneous and constitutionally unsound, it is difficult to believe that it would have been accepted for a period of almost twelve years and quoted so many times. Even the majority concedes that the court in *Briggs* was composed of distinguished jurists, Judges Parker, Dobie and Timmerman. If the majority is correct, it is entirely likely that never before have so many judges been misled, including judges of this Court,[14] for so long by such a clear, understandable direct, and concise holding as the language in *Briggs* which the opinion now condemns. The language is straightforward and simple: "The Constitution, in other words, does not require integration. It merely forbids discrimination."

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[13] See opinion page 881.

It is interesting also to observe that the Supreme Court has never disturbed the *Briggs* language, although it has had numerous opportunities to do so. As a matter of fact, it has come very close to approving it: if it has not actually done so. In the case of Shuttlesworth v. Birmingham Board of Ed. (N.D.Ala.1958) 162 F.Supp. 372, 378, the district court speaking through Judge Rives quoted the *Briggs* opinion. The Supreme Court affirmed the judgment. Shuttlesworth v. Birmingham Board of Ed., 358 U.S. 101, 79 S.Ct. 221, 3 L.Ed.2d 145.

The majority rule requiring compulsory integration is new and novel, and it has not been accepted by the Supreme Court or by the other Circuits. The rationale of *Briggs* has been approved. *Brown* decisions, supra; Goss v. Bd. of Educ. of City of Knoxville, supra; Bolling v. Sharpe, 347 U.S. 497, 498, 74 S.Ct. 693, 98 L.Ed.884; Com. of Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230, 231, 77 S.Ct. 806, 1 L.Ed.2d 792; Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (passim); Scull v. Com. of Virginia, 359 U.S. 344, 346, 79 S.Ct. 838, 3 L.Ed.2d 865; Wolfe v. State of North Carolina, 364 U.S. 177, 182, 80 S.Ct. 1482, 4 L.Ed.2d 1650; Gomillion v. Lightfoot, 364 U.S. 339, 349, 81 S.Ct. 125, 5 L.Ed.2d 110; Garner v. State of Louisiana, 368 U.S. 157, 178, 82 S.Ct. 248, 7 L.Ed.2d 207; Turner v. City of Memphis, 369 U.S. 350, 353, 82 S.Ct. 805, 7 L.Ed.2d 762; Johnson v. State of Virginia, 373 U.S. 61, 62, 83 S.Ct. 1053, 10 L.Ed.2d 195; Wright v. Rockefeller, 376 U.S. 52, 57–58, 84 S.Ct. 603, 11 L.Ed.2d 512; Springfield School Committee v. Barksdale (1 Cir. 1965) 348 F.2d 261; Bradley v. School Board of City of Richmond, Va. (4 Cir. 1965) 345 F.2d 310; Swann v. Charlotte-Mecklenburg Board of Educ. (4 Cir. 1966) 369 F.2d 29; Deal v. Cincinnati Board of Educ. (6 Cir. 1966) 369 F.2d 55; Bell v. School City of Gary, Indiana (7 Cir. 1963) 324 F.2d 209; Clark v. Board of Educ. of Little Rock (8 Cir. 1966) 369 F.2d 661; Downs v.Board of Educ. of Kansas City (10 Cir. 1964) 336 F.2d 988, cert. den., 380 U.S. 914, 85 S.Ct. 898, 13 L.Ed.2d 800.

CONCLUSION

It is my judgment that the de facto-de jure distinction created in the opinion can not be supported as a matter of law. Percentage or proportional enrollment requirements based on race, and enforced integration are in violation of well established constitutional concepts in my opinion.

While it cannot be denied there has been recalcitrance and resistance to desegregation as required by the *Brown* decisions in numerous areas, I cannot share in the pessimism expressed in the opinion. Throughout the country a substantial effort has been made to eliminate segregation and substantial progress has been made. The *Brown* decisions contemplated some difficulties and complexities. A review of the history of the difficulties involved strongly indicate that the greatest problems arise when a start or "break through" is initiated. Recalcitrance and resistance which appeared initially in many areas have now subsided or disappeared. It is also true that the emphasis has shifted properly from "deliberate" to "speed" I continue to have confidence in the local school boards of the nation. While some of them have performed slowly and a few have not performed at all, the vast majority of school boards are composed of conscientious, civic minded, sincere people who are undertaking to do what is best for the school children of the nation. We should not interfere with them unduly.

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[14] See the very clear dissenting opinion of Judge Cox.

Furthermore, I continue to have confidence in the judicial system of the country and hold the firm belief that the record of the courts in achieving compliance with the *Brown* decisions demonstrates that the courts have given their prompt, careful and diligent attention to the problems as they have arisen. In my view the heaviest burden has been on the district courts, and inevitably the best solutions will come at the district court level where the judges are in close contact with local complexities, obstacles and problems. The primary responsibility should be left where the Brown decisions placed it, with the boards of education under the supervision and guidance of the district courts. This is not to say that the courts should not accord full consideration to the expertise of the Department of Health, Education and Welfare; and we should give due consideration to HEW Guidelines when it is appropriate to do so. However, the provisions of the Civil Rights Act of 1964 should not be by-passed. Rules, regulations and orders of general application should be enacted in accordance with the requirements of due process and school systems should not be penalized by such rules, regulations or orders which are not approved by the President as provided by the Act. It is no answer to say that the guidelines are interpretive regulations or "housekeeping" rules. They are being used and applied as general rules, regulations or orders.

Due to developments in the jurisprudence, particularly with respect to desegregation of faculty and staff, the orders of the district courts should be vacated and the causes remanded for further consideration and for evidentiary hearings in the district courts. In effect the appellees recognize the fact that this must be done. We should not reverse the district courts on questions which were not issues before them and fashion our own decree with respect to such issues without any evidentiary basis or without affording an opportunity for the presentation of evidence relating to such issues in the district courts.

GRIFFIN B. BELL, Circuit Judge, with whom GEWIN, Circuit Judge joins (dissenting).

I respectfully dissent. The two-judge or original opinion of December 20, 1966 is what the majority has adopted. That opinion seriously erodes the doctrine of separation of powers as between the Executive and the Judiciary. Moreover, much of its language is in the nature of overreach and, as such, adds confusion and unrest to the already troubled area of school desegregation. The overtones of compulsory integration and school racial balances in the original opinion can only chill the efforts of school administrators to complete the task of eliminating dual school systems in the South. In addition, the other side of some of the more important holdings of the majority opinion should be considered and those propositions stated which militate against their validity.

The plain intent of the two opinions is to establish a uniform law for the school systems of this circuit. Thus, the opinions must be tested as laws. Their validity and efficacy as laws should be considered in the frame of reference of need, fairness, clarity and what is constitutionally permissible.

It is fundamental in law making that laws should be fair as between people and sections. The requirement that laws be clear in meaning is also a fundamental. We cannot be expected to obey the law if we cannot understand it. Caligula kept the meaning of the laws from the Romans by posting them in narrow places and in small print[1]—it is no different today when the law is couched in vagueness.

Then there is the matter of personal liberty. Under our system of government, it is not to be restricted except where necessary, in balance, to give others their liberty, and to attain order so that all may enjoy liberty. History records that sumptuary laws have been largely unobserved because they failed to recognize or were needlessly restrictive of personal liberty. Our experiments with sumptuary-like laws are exemplified by the *Dred Scott* decision, Scott v. Sandford, 19 How. 393, 15 L.Ed. 691, Reconstruction, and the prohibition laws. All failed.

The majority opinions, considered together, fail to meet the tests of fairness and clarity. The advance approval given to a requirement of compelled integration exceeds what is constitutionally permissible under the Fourteenth Amendment. They cast a long shadow over personal liberty as it embraces freedom of association and a free society. They do little for the cause of education.

It is important, however, that this dissenting opinion not mislead any person having responsibility in the area of school desegregation. The dual system of education must be eliminated. This was ordered in 1955. Brown v. Board of Education of Topeka, 1955, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083. School boards were told to convert the dual segregated school systems into racially nondiscriminatory school systems. The court pointed to problems that might arise in the transition with respect to the physical condition of school plants, transportation, personnel, and in the revision of school districts and attendance areas into compact areas. This order followed reargument of the question of remedy after the 1954 decision holding segregated education under the separate but equal doctrine unlawful. Brown v. Board of Education, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873. After full argument, the transition was ordered. The separate but equal doctrine was already lost and the time for remedy was at hand. Transition was the remedy provided.

Transition to date has in the main consisted of following a freedom of choice plan for pupil assignment. But freedom of choice without faculty desegregation and the elimination of discrimination in buildings, equipment, services and curriculum will not suffice to convert a dual system into a unitary nondiscriminatory system. The slow progress to date toward eliminating dual systems is what has brought about the majority opinions, and is also at the root of the disturbance between the Health, Education, and Welfare Department and many school boards. The objective must be, as the Department of Justice contends, that there be no white schools—no Negro schools—just schools. But this is all that is required and it can be accomplished without the open-end compulsory integration language of the majority opinions, or the geometric progression guidelines[2] of HEW which the majority opinion approves.

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[1] Suetonius, The Lives of the Twelve Caesars, (Random House, 1959), p. 191, 192.

The mandate of the Supreme Court in *Brown II* can be carried out by the assignment of faculty and students without regard to race, and by affording equality in educational opportunity from the standpoint of buildings, equipment, and curriculum. Where freedom of choice in student assignment is ineffective to the extent that a dual system continues, it can be implemented by a neighborhood assignment plan. Assignments should then be made by the school board to the school nearest the home of the student, whether formerly white or Negro. Then the child would be given the option under a freedom of choice plan of attending another school with priority to attend being based on proximity of residence to school. This method of student assignment is comparable to what is being used in Charlotte. Cf. Swann v. Charlotte-Mecklenburg Board of Education, 4 Cir., 1966, 369 F.2d 29 (En banc).

We should order the school boards in these cases, which they and the entire court agree must be reversed, to forthwith complete the conversion from dual to unitary systems by the use of these minimum but mandatory directions. School boards and the public would understand the objective—to convert dual school systems into unitary nondiscriminatory systems just as the Supreme Court directed twelve years ago. School boards and the public would also understand the method to be followed in the conversion. But this approach is too simple for the majority. Their view is that something more is required—a result which brings about substantial integration of students. The mandatory assignment of students based on race is the method selected to achieve this result. This is a new and drastic doctrine. It is a new dimension in constitutional law and in race relations. It is new fuel in a field where the old fire has not been brought under control.

PROCEDURAL DUE PROCESS AND THE APPROVAL OF THE GUIDELINES

The scope of the majority holding as to the binding force on the federal courts of the HEW guidelines in the area of school desegregation posed a serious separation of powers question. That fact alone should have indicated that the validity of the HEW guidelines was of primary concern. One of the major premises of the original or panel opinion is that HEW excuses those school systems which are under court order from compliance with its guidelines; hence, the necessity of the court setting the guidelines as minimum standards to prevent the courts from being used as an escape route. The original HEW

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[2] Even while these cases were pending after en banc argument, HEW announced new guidelines. Now for a school system to receive approval without further investigation, it must show that the number of minority group students in integrated schools within the system in the school year 1967–68 will be double the number present in 1966–67 and in some instances triple the number. New Orleans Times-Picayune, March 16, 1967, page 1, Column 4, Associated Press.

Regulation promulgated in 1964 makes this possible. Title 45A, CFR, § 80.4(c). The HEW statement of policy of 1965, Title 45, CFR, § 181.4, receded from this position but the latest HEW policy supersedes the 1965 statement which includes § 181.4, supra. See HEW March and December 1966 Statements—not reported in CFR.

The HEW Statements of Policies for School Desegregation are referred to generally in the school desegregation world as guidelines. At least three such statements have been issued: one in 1965, one in March 1966, and another in December 1966. There apparently have been amendments. Footnote 2, supra. No guidelines whatever were in issue in the lower courts.[3] The guidelines of March 1966 had not been promulgated when the cases were there. Indeed the guidelines of December 1966 had not been promulgated when the cases were submitted after argument to the original panel of this court. The fact that they had not been in issue did not deter the court in the original opinion. There it was held that the " * * * HEW guidelines now in effect are constitutional and are within the statutory authority created in the Civil Rights Act of 1964". This perhaps meant all guidelines promulgated up to the date of the opinion, December 29, 1966. Any doubt as to the inclusion of the December 1966 guidelines was resolved when the majority in the en banc per curiam opinion stated that the 1965 and 1966 HEW guidelines are within the decisions of this court and comply with the letter and spirit of the Civil Rights Act of 1964 and meet the requirements of the United States Constitution. This is adjudication without any semblance of due process of law. It is an unprecedented procedure and a shocking departure from even rudimentary due process.[4] Approval of future guidelines is limited by the majority to those " * * * within lawful limits."

The theory of the court escape route and the necessity to hold all guidelines valid is apparently developed in the interest of supporting the national policy, as expressed in the Civil Rights Act of 1964, of eliminating discrimination in public education. The general theme of the majority is that HEW has the carrot in the form of federal funds but no stick. A stick is needed in those situations where a school board may not take federal funds. The aim is to make a stick out of the federal courts. The courts should cooperate with HEW but they cannot be made to play the part of any stick that HEW may formulate and this is the tenor of the original opinion. Courts are restricted to acting within the limits of the Fourteenth Amendment in the school desegregation area. It may or may not be proper for a court to act within the limits of what the HEW policy may be in allocating federal school funds. Sometimes there may be a difference. A decent respect for the judiciary dictates that we make this plain.

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[3] The practice of hearing appeals in school cases on old records is very unsatisfactory. We do not know what changes in desegregation plans may have been made in the interim. It is a rapidly changing public area where plans as well as the law are in flux. Cf. Calhoun v. Latimer, 1964, 377 U.S. 263, 84 S.Ct. 1235, 12 L.Ed.2d 288, where the court took note of a supervening plan and remanded for an evidentiary hearing in the District Court.

[4] Section 602 of Title IV of the Civil Rights Act of 1964, 42 USCA, § 2000d–1 provides that no rule, regulation or order of HEW shall become effective unless and until approved by the President. Whether the guidelines are such rules or regulations cannot be decided without an evidentiary hearing concerning their meaning through application. This question has never been put in issue in these cases.

THE STANDARD REQUIRED BY THE MAJORITY IS UNCONSTITUTIONALLY VAGUE

The original opinion states in two places that the only satisfactory plan for desegregating a school system is one that works. One looks in vain for a definition of "one that works." This is manifestly a vague standard. It cannot be followed. Moreover, it is subject to selective enforcement and a statute couched in such language would be patently unconstitutional.

In another place in the original opinion the statement is made that, substantial integration must be achieved in disestablishing dual school systems. This is not clear. What is substantial? Is the reference simply to a system, or to each school, or to each class room?

The en banc per curiam opinion may have attempted to improve the standard by saying that the criterion for determining the validity of a provision in a school desegregation plan is whether the provision is reasonably related to accomplishing the objective of educational opportunities on equal terms to all. Who knows the meaning of this? There is no mention of result.

These vague standards are perhaps the most mischievous parts of the majority opinions. They place unfettered discretion in HEW in the area of school desegregation. No school board will ever know when it has performed its duty to eliminate the dual school system. No school board will ever know whether federal funds will be made available. This type of standard places school systems under men and not laws. School boards and school patrons are entitled to a clear and definite standard. The problem of desegregation will not be solved absent a clear standard.

THE DE JURE-DE FACTO DOCTRINE IS UNFAIR

The unfairness which inheres in the majority opinion stems from the new doctrine which the original panel fashioned under the concept of classifying segregation into two types: de jure segregation, called apartheid, for the seventeen southern and border states formerly having legal segregation; and de facto segregation for the other states of the nation. This distinction, which must be without a difference and somewhat hollow to a deprived child wherever located, is used as a beginning. The original opinion then goes on to require affirmative action on the part of the school authorities in the de jure systems to integrate the schools. The neighborhood school systems of the nation with their de facto segregation are excused. The Constitution does not reach them.[5]

This reasoning is necessary to reach the end of compulsory integration in the so-called de jure states. It is the counterpart to overruling the settled construction of the Fourteenth Amendment, to be next discussed, that integration is not commanded. The restrictions in the Civil Rights Act of 1964 against requiring school racial balances by assignment and transportation are written out of the law with respect to the de jure states by using the de jure-de facto theory. Title IV, §§ 401(b), 407(a), 42 U.S.C.A. §§ 2000c(b), 2000c-6. The overruling of the constitutional limitation removes the other impediment to compulsory integration. The way is thus cleared for the new dimension. The only question left is when, and to what extent. The authority to HEW is carte blanche. We should disavow the de jure-de facto doctrine as being itself violative of the equal protection clause. It treats school systems differently. It treats children differently. It is reverse apartheid. It poses the question whether legally compelled integration is to be substituted for legally compelled segregation. It is unthinkable that our Constitution does not contemplate a middle ground—no compulsion one way or the other.

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[5] The legislative history of the Civil Rights Act of 1964 does not show that Congress acted on a de jure-de facto basis. I would not attribute such a form of sectionalism to the Congress.

The de jure-de factor doctrine simply is without basis. Segregation by law was legal until the *Brown* decision in 1954. Such segregation should hardly give rise to punitve treatment of those states employing what was then a legal system. The Supreme Court has never so indicated. Moreover, the Supreme Court holding in *Brown* was based on the finding that segregated education was unequal. How can it be unequal in one section of the country and not another? Does *Brown* interdict only segregation imposed affirmatively by law, or does its rationale also include the state action of holding to neighborhood assignments thereby perpetuating de facto segregation? The majority decision limits the rationale to the southern and border states type of segregation formerly imposed affirmatively by law. In such event compelled integration may be required in the de jure states but the logic of reaching this point, because of the restrictions in the 1964 Act to the contrary, excuses the de facto states from the Act and the Constitution.

The real answer is that no such new doctrine or theory is necessary. The schools of the South and border states must do what the Supreme Court has ordered—convert dual school systems into unitary nondiscriminatory school systems. The constitutional power already exists in the courts to see that this is done. This newly dicovered source of power tends only to disturb settled doctrine. Its purpose can only be to require racial balances in the de jure states.

The Briggs Dictum

It is a settled constitutional principle that the Fourteenth Amendment does not require compulsory integration but only proscribes segregation. It is the state action segregation which violates the equal protection clause. We have so stated in the following cases: Avery v. Wichita Falls Independent School District, 1956, 241 F.2d 230; Borders v. Rippy, 1957, 247 F.2d 268; Rippy v. Borders, 1957, 250 F.2d 690; Cohen v. Public Housing Administration, 1958, 257 F.2d 73; City of Montgomery v. Gilmore, 1960, 277 F.2d 364; Boston v. Rippy, 1960, 285 F.2d 43; Stell v. Savannah-Chatham County Board of Education, 1964, 333 F.2d 55; Evers v. Jackson Municipal Separate School District, 1964, 328 F.2d 408; Lockett v. Board of Education of Muscogee County, 1965, 342 F.2d 225.

This principle is euphoneously referred to in the original two-judge opinion as the *Briggs* dictum. It was stated in Briggs v. Elliott, E.D.S.C., 1955, 132 F. Supp. 776, but no court, until now, has ever held the Fourteenth Amendment to mean otherwise. The Amendment is entirely negative in character. The original panel, as a part of its two-pronged approach to compulsory integration, overruled this principle *sub silentio*.

The court, sitting en banc, could overrule this settled principle and the majority has now done so to an unknown extent in paragraph 3 of the per curiam opinion. We will not know the extent until the question of racial percentages is squarely presented. Here, as I understand the per curiam opinion, the question is tangential except as it relates to converting to a unitary school system. In the first sentence of paragraph 3 the majority holds that school boards have the affirmative duty under the Fourteenth Amendment to bring about a unitary school system in which there are no Negro or white schools—just schools. We can all agree on this statement. The opinion does away with any distinction between the terms "integration" and "segregation" in the field of school desegregation law insofar as the distinction interferes with the affirmative duty to bring about unitary school systems. We can all agree on this. It is then said that in fulfilling this duty it is not enough for school authorites to offer Negro children the opportunity to attend formerly all white schools but that such opportunity must be coupled with the integration of faculty, facilities, and activties. Then, without more, the decisions of this court setting out this principle are overruled to the extent that they conflict with the view of the majority. I am left in doubt as to whether this is a retrenchment from the panel decision. Time will tell.

It may be added that if the court is overruling this settled constitutional principle, it brings this circuit into conflict with the First, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits. Springfield School Committee v. Barksdale, 1 Cir., 1965, 349 F.2d 261; Bradley v. School Board of City of Richmond, Virginia, 4 Cir., 1965, 345 F.2d 310; Swann v. Charlotte-Mecklenburg Board of Education, 4 Cir., 1966, 369 F.2d 29; Deal v. Cincinnati Board of Education, 6 Cir., 1966, 369 F.2d 55; Bell v. School City of Gary, Indiana, 7 Cir., 1963, 324 F.2d 209, cert. den., 377 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216; Clark v. Board of Education of Little Rock, 8 Cir., 1966, 369 F.2d 661; and Downs v. Board of Education of Kansas City, 10 Cir., 1964, 336 F.2d 988, cert. den., 380 U.S. 914, 85 S.Ct. 898, 13 L.Ed.2d 800. The case of Taylor v. Board of Education of City School Dist. of City of New Rochelle, 2 Cir., 1961, 294 F.2d 36 is not to the contrary. There the remedy fashioned was freedom of choice imposed on neighborhood assignments. The case of Board of Education of Oklahoma City, etc. v. Dowell, 10 Cir., 1967, 375 F.2d 158, [dated January 23, 1967], does not appear to be to the contrary. The court distinguished *Downs* by pointing out that *Dowell* involved a finding of bad faith on the part of the school board in carrying out the original order of the District Court to disestablish the dual school system.

It is hard to know just what the court has held as between the panel decision and the en banc per curiam decision. The labored effort to establish the de jure-de facto concept and to overrule this constitutional principle hardly seems calculated as an exercise in semantics. It is more in the nature of judicial lagniappe for use on another day. We will know the full import of the opinions when a motion is presented to assign children on the basis of race so as to comply with what each particular movant may deem to be, in his view, a desirable racial composition for the particular school or schools. This leaves the law in a very unsatisfactory state and portends of utter confusion for school boards.[6]

THE DECREE

The use of a uniform decree, as the majority points out, is not novel. Our school desegregation decisions have tended toward uniformity in the freedom of choice method of assignment and in the administration of such plans. A uniform decree within the limits of minimum standards would aid school boards and the district courts but the uniform decree entered in this case can be faulted because of its detail. This comes about through the unbounded aim of the court to track the HEW guidelines. It must be remembered that decrees may have to be enforced by the court and a court should guard against being put in the unfeasible position of having to hear motions based on the alleged breach of some minor and insubstantial provision of its decree. It is also not clear to me that sufficient latitude is left to the district courts to adjust such practical difficulties as may arise under the detail of the decree.

HEW has an advantage over the district courts, as the court has now restricted them, in the execution of school desegregation plans. HEW may delay, excuse, and change. HEW may vary its requirements as between systems. The majority has left no such power in the district courts. They are admonished to follow HEW but it is a sad day for the district courts, and for the entire judiciary as well as for the principle of separation of powers when the only discretion left them is within the limits to be set by HEW.

It also would appear improper to constitute the courts as overlords of the school systems of this circuit to the extent done in the uniform decree. The district courts must require school equalization to the extent set out in paragraph VI of the decree. Its scope is only a short step from taking over curriculum. The building improvement provision moves the courts in the direction of levying local taxes. Ordering school boards to discontinue the use of buildings could amount to taking property without due process and just compensation. These are drastic measures and there are no facts before the court to demonstrate the necessity for them. It is entirely proper for the District Court to disapprove new construction where it will perpetuate the dual school system but this is a matter for complaint and hearing rather than for advance supervision as is required under § VII of the decree.

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[6] A good example of the problems to be encountered in eliminating the dual school system is to be seen in the Taliaferro County, Georgia school system. See Turner v. Goolsby, S.D.Ga., 1965, 255 F.Supp. 724, for background. There were only two schools in the system and the board desegregated, effective in September 1966, on the basis of converting the white school into an elementary school and the Negro school into a high school. A perfect racial balance would be accomplished under the plan. In 1965 there were approximately 600 Negro children and 200 white children enrolled in the system. The records of the Georgia State Department of Education as of January 19, 1967 indicate that there are now 527 Negro students enrolled in the Talfferro County school system and no white students. This result raises serious questions. How is a "plan that works" to be formulated for this school sytem? What number of white students will be needed to make it work? Where will they come from? How will they be selected? Will a lottery system be used? Will they be compelled to attend the Taliaferro County school system? If so, how? Will the taxpayers of the system be compelled to pay for educating children brought in from outside the system? Will the court ignore system lines although the laws of Georgia provide for separate school systems? What measures will be employed to avoid resegregation through families removing their residences from the school system? Granted this is an extreme example but it is nevertheless a factual situation.

By way of summation, I reiterate that the majority opinions are unfair to the extent that they discover or establish and then rely upon the de jure-de facto divisive sectional theory. The opinions expand, without constitutional authority, the requirement that dual school systems be converted into something more than unitary school systems: to-wit, that substantial integration be achieved in the respective school systems. This added requirement is itself impermissibly vague as a standard without further delineation. The opinions unduly restrict personal liberty to the extent that compelled integration is approved or required, and in this regard improperly overturn and expand the settled meaning of the Fourteenth Amendment. The court errs in prematurely holding that the guidelines issued by HEW are contsitutional and within the scope of the Civil Rights Act of 1964. No guidelines whatever were considered by the district courts. Some of those approved had not been written.

My own view is that the law makes no such requirement as the majority of the court imposes. No such radical departure is necessary to accomplish what the Supreme Court has directed the lower courts to accomplish—the elimination of the dual school system. The Supreme Court has not said that every school must have children from each race in its student body, or that every school room must contain children from each race, or that there must be a racial balance or a near racial balance, or that there be assignments of children based on race to accomplish a result of substantial integration. The Constitution does not require such. We would do well to "stick to our last" so as to carry out the Supreme Court's present direction. It is no time for new notions of what a free society embraces. Integration is not an end in itself: a fair chance to attain personal dignity through equal educational opportunity is the goal. My view, however, is now lost in this court; hence this DISSENT.

COLEMAN, Circuit Judge (separate opinion).

These cases remind me of what Mr. Chief Justice Chase said in State of Texas v. White:[1]

> "We are very sensible of the magnitude and importance of this question, of the interest it excites, and of the difficulty, not to say impossibility, of so disposing of it as to satisfy the conflicting judgments of men equally enlightened, equally upright, and equally patriotic. But we meet it in the case, and we must determine it in the exercise of our best judgment, under the guidance of the Constitution alone."

This court, exercising only such appellate jurisdiction as Congress has seen fit to confer upon it, confronted solely by a question of how best to preserve an already settled Constitutional right, should be guided *by the Constitution alone and by nothing else.*

No one denies that to an incalculable degree the future of this Country depends inescapably upon the continued, constantly improved education of *all its inhabitants.* Nor can it very successfully be denied that the best practical hope of attaining this objective is to be found and maintained in the public schools. It became plain over a hundred years ago that private schools did not and could not reach the masses of the people.

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[1] 7 Wall. 700, 720, 74 U.S. 700, 720, 19 L.Ed. 227 (1868).

Compulsory discrimination in the public schools, founded on race or color, is Constitutionally dead. No Judge would dispute this. Existentially it is like the wounded animal which bounds on for awhile after it has been fatally shot. The critical problem now is that we must not wreak irreparable injury upon public schools while executing the sentence of death against compulsory segregation. Thoroughly realizing this, the Supreme Court left the details of the eradication to the sound judicial discretion of the District Courts, subject only to appellate review. To this day this assignment has not been changed. I do not suppose in our form of government that it could be changed. Courts alone make binding adjudications on questions of Constitutionality, and litigation must begin at the District level.

The public schools of the Nation, not just those of a particular section, are now caught up at the second battleground, legal and political, not about the death of unlawful discrimination but about who and how many of any particlar race shall go to any particular school with how many members of some other race. If one looked only at the great volume of litigation and its accompanying strife and publicity he would jump to the conclusion that nothing matters but the racial composition of any educational facility. This is pursued regardless of the real preferences, exercised, in genuine freedom, of those directly involved, that is, those who must have an education. In the ultimate this could become a great tragedy for those most affected. An educational house divided against itself may have trouble standing. It certainly cannot operate with maximum effectiveness.

In the light of these considerations, as one who was able to secure an education solely because there was a public school in which there was an opportunity to obtain it, I shall now express my views, as one Judge of this Court, individually, as to the decision now about to be rendered.

In doing so, I proceed upon the thesis that there is nothing at all inconsistent about being, at the same time, both a loyal American and a Southerner. I think Andrew Jackson conclusively settled that point over a century ago.

It is particularly unfortunate if our decision in these cases is in any way to be grounded on old scores against the States of this Circuit. This is contrary to American legal tradition: it opens old wounds, rekindles old fires, and lends itself as a weapon to the futile cause of further intransigency. Prior to 1954, racially separate, if equal, schools had not been condemned as unconstitutional. One is not to be punished or harassed for a act which was lawful when it was done. Indeed, such condemnation in this instance would inferentially include some of the most highly respected Judges who ever graced the Supreme Court. They had opportunities to condemn the system but, in the exercise of perfect judicial integrity, did not. As I understand it, an Omnipotent God does not change yesterday when it is past and gone. Certainly this Court cannot do it. We are now concerned with rectifying the errors of the present and forestalling, if we can, the anticipated errors of the future. I decline to participate in any ex post facto condemnations. I prefer to believe that this Court is not deliberately doing so.

I further believe that whatever the Fourteenth Amendment requires of any State it requires of all States. If we are requiring something here in the enforcement of Fourteenth Amendment rights that should not be required of all fifty States then we have exceeded our authority and we have misapplied the Constitution. I agree with the action of the majority opinion in disclaiming any intention of passing on the validity of educational operations in other Circuits. That matter is not and cannot be before us.

It is out of regard for the desirability of Constitutional uniformity that I agree, in principle, with the attempt to formulate a degree for the future guidance of District Courts in this Circuit. It is obvious that such a decree cannot adjudicate cases in advance of a hearing in the District Court, nor can it be applied in the absence of factual justification.

The decree speaks for itself, of course, but I interpret it to deal at this point with making freedom of choice a reality instead of a promise. I do not understand that this Court has abandoned freedom of choice, if that choice is real instead of illusory.

Nor do I understand it to direct that there shall be a specified percentage of the various races in any particular public school or that there shall be proportional representation of the races brought about by arbitrary order. I agree with Judges Gewin and Bell that the opinion strongly portends such a possibility. But paragraph 5 of the en banc opinion certainly disclaims any such intention. The District Courts are left free to consider all the evidence, including racial attendance percentages, in determining whether the children of any particular school district have been offered a reality instead of a shadow. It is to be anticipated that the bridge will later have to be crossed when we come face to face with a situation wherein there can be no doubt of the freedom but the results are displeasing and are attacked solely for that reason.

I think it all boils down to this. We once had the doctrine of separate but equal. We did not, I am sorry to say, pay much attention to the "equal." We now have freedom of choice. As Judge Bell so splendidly states it, we are now going to have to make certain of the "freedom". To fail in this is to invite other action which at this time I regard as unconstitutional but which could soon be made Constitutional.

The decree is not as I would have written it had I been charged with sole responsibility for the effort. No offense is intended when I doubt that it is perfect. For example, the *en banc* opinion says that "boards and officials administering public schools in this circuit have the affirmative duty under the Fourteenth Amendment to bring about an integrate, unitary school system." Yet II(o) of the decree prohibits any official from influencing parents or students in the exercise of a choice. In other words, if the officials feel that Negro children should be encouraged to apply for admission to a formerly white school they are prohibited from doing so. They are to be condemned, on appearances, if no Negro child chooses to attend a formerly white school; they are not allowed, in the exercise of ordinary freedom of speech, to discuss the matter with Negro children with a view to their exercising a preference in favor of attending a school they have not formerly attended. The school official cannot win. In one breath he is told to act; in the next he is immobilized.

Experience will hone away these inconsistencies and impossibilities. This Court has drafted uniform decrees on prior occasions. These are now speedily outmoded, if not abandoned. Judges, like other human beings, do not always write in granite; they often find that they have only marked in the sand.

Since the HEW guidelines were not the subject of a hearing in the Courts below I do not discuss them here. In my view, they are not now before this Court.

The focal point of the whole matter is the action of the *en banc* opinion repudiating Briggs v. Elliott and overruling our prior opinions which followed the same rationale, see Footnotes 1 and 2 for the citations.

It is my view that these prior cases were correctly decided. Other Circuit Courts in this Country appear to feel likewise. If the reasoning in these overruled cases is incorrect then we simply face the following:

The freedom of the Negro child to attend any public school without regard to his race or color, first secured in the *Brown* cases, is again lost to him after a short life of less than thirteen years. He is left open to a future adjudication that although he does not wish to attend School A and has in fact expressed a desire to go elsewhere this is of no importance. Because of his race he can be assigned to a particular school to achieve a result satisfactory to someone who probably does not even live in the district but who wishes to make a racial point. Thus the child reenters the same racial discrimination from which he escaped so short a time ago. He remains bogged in race. Moreover, when Negro children are to be selected by someone, we know not who, to comply with such a racial assignment, on what basis will the selection be made? How will the wishes of some be respected and others rejected, solely because they happen to be of the Negro race? We are not freeing these children of racial chains. We are compounding and prolonging the difficulty.

The true answer remains, give him absolute freedom of choice and see to it that he gets that choice in absolute good faith.

In conclusion, I wish to say that in my own case a burning desire to obtain an education in the face of impossible circumstances is not a theoretical experience encountered only by others. I did not have an opportunity to attend school until was eight years of age. The delay was quite unavoidable; there simply was no school to attend at that particular time. My mother taught me how to read and write, to add and subtract. My total sympathies are with the cause of education freely available to all. This, of course, under the Constitution requires no special privileges for any group or segment of the population. I regret that where once the concern was for schools to attend we now have so much strife about the details of utilizing those so readily available.

What I have said herein is with the greatest deference for my Brethren who think otherwise. We must and shall continue to work together according to our individual judgments of the law. The en banc decision may portend more problems ahead than we have heretofore encountered.

I concur in the reversal of the Judgments, below, but in my views of the issues generally are as herein set forth.

Godbold, Circuit Judge (dissenting):

I respectfully dissent. I wish not to delay appellate procedures if any of the parties desire to pursue them. Therefore, I am recording my dissent at this time and will file a dissenting opinion at a later date.

GODBOLD, Circuit Judge (dissenting):

I recognize and oppose the inequities of state-enforced and state-encouraged racial discrimination in the operation of public schools. I respect the energy, labor and intellect that judges of this and other courts have given in the past twelve years toward solution of such inequities. I understand, and share, the desire to chart a future course having fewer difficulties and frustrations. Nevertheless, although the decrees appealed from must be reversed, I dissent from the opinion and the decree.

Because this dissent is late-filed and numerous points have been discussed in the other dissenting opinions, I shall limit this opinion to only a few of the grounds on which the majority opinions, in my view, are both incorrect constitutionally and inappropriate as a matter of judicial administration.

I

In the critical area of student assignment the majority propose an unconstitutional condition on the operation of a valid freedom of choice system, violative of equal protection and of due process. This court has deemed freedom of choice [1] an acceptable method for a school board to use in fulfilling its duties. Singleton II, 355 F.2d at 871. HEW recognizes it as a permissible means of desegregation. 1966 Revised Guidelines, Subpart B, 181.11; also Subpart D. A substantial part of the majority opinions and the attached decree are directed at setting out requirements of a free choice plan that is truly free and unfettered. But the majority superimpose upon free choice, even though in all respects fairly and validly set up and administered, a condition subsequent that the statistical results of racial mixing [2] produced by the freely-made choices must be acceptable under standards imposed from outside those making the choice. They do this by establishing as a constitutional requisite that a free choice system must produce a degree of staudent racial mixing, not yet defined as to limits but nevertheless required.

The United States reads the language of the majority in this vital area as mere dictum. In brief on rehearing the government says: "The appellees, in petitioning for rehearing, asserted that the decision of the panel held that the Constitution imposes an absolute duty to achieve a racial mixing of students so as to eliminate a disproportionate concentration of Negroes in certain schools within a system. Once this proposition is asserted, the appellees have no difficulty in disparaging the opinion as being inconsistent with prior holdings of the Fifth Circuit. It is true that the panel indicated its concern that educational opportunities on an equal basis be furnished to all, and the opinion does suggest in a footnote that elimination of the all-Negro school makes this objective easier to obtain. *But the appellees misread the opinion when they claim that this is the holding of the Court.*" I wish that I could read the majority as saying no more than that disproportionate racial concentration of students is evidentiary of whether a freedom of choice system is truly free, or share with confidence the view that the teeth of the original opinion are extracted by paragraph 5 of the en banc opinion. I am not able to do so. If the language of mandatory mixing is indeed a mere aside we shall all await with interest to see whether the courts are the prisoners of their own slogans and the dictum of today is to be asserted as the law of tomorrow.

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[1] Throughout this opinion "freedom of choice" and "free choice" refer to a plan validly set up, properly administered, and with choices freely exercised without external pressures, so that the plan itself (as opposed to the statistical results produced by exercised choices) is in all respects constitutionally acceptable.

[2] The term "racial mixing" is used with intent that it be neither laudatory nor denigrating of the process and the individuals involved, but as a simple descriptive phrase that avoids further confusing use of "integration" and "desegregation."

The majority define "integration" and "desegregation" as conversion of a de jure segregated dual school system to a unitary, nonracial (nondiscriminatory) system—students, faculty, staff, facilities, programs, and activities, this for the objective of offering equal educational opportunities for all.[3] There are two strings to the bow of this definition. To convert a dual system into a unitary, non-racial system the student body is one of the arms of the system which must be converted. Second, the equal educational opportunity that must be offered is elsewhere in the opinion equated with a racially mixed education.

The majority state firmly that the law does not require racial balance, or a "maximum of racial mixing", nor that each and every child shall attend a racially-balanced school,[4] and that Guidelines are not be used to establish racial "quotas." Percentage figures in the Guidelines may be rules of thumb as the majority say. It may develop that neither the courts nor the Commissioner of Education will seek to achieve racial balance by the Guidelines or otherwise. But all this is irrelevant to the constitutional issue. Grasping the irrelevancy requires understanding that "racial balance" is a word of art referring to a ratio of Negro and white students in approximately the same proportions as Negro and white population of the community or of the schools. It is proposed that governmental action must produce a degree of racial mixing less than "racial balance" but, by someone's standards, sufficiently mixed to produce "equal educational opportunity," even though free choices by students and their parents have produced a contrary or lesser result.[5] Despite disclaimers of specific figures and of racial balance, power to require mixing is reserved within a range, a hazy range to be sure but nevertheless existent.[6] If the Commissioner and the courts constitutionally have no power to require racial mixing superimposed on a valid free choice system, constitutionality is not conferred by the premise that they will not employ the power to the extent of "racial balance" but are free to roam at will in requiring mixing to a lesser extent.[7]

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[3] Footnote 5 of majority opinion 372 F.2d at 846–847.

[4] Ibid.

[5] For example:

"As the Constitution dictates, the proof of the pudding is in the eating: the proof of a school board's compliance with constitutional standards is the result—the performance. Has the operation of the promised plan actually eliminated segregated and token-desegregated schools and achieved substantial integration?" 372 F.2d at 894.

"If school officials in any district should find that their district still has segregated faculties and schools or only token integration, their affirmative duty to take corrective action requires them to try an alternative to a freedom of choice plan, such as a geographic attendance plan, a combination of the two, the Princeton plan, or some other acceptable substitute, perhaps aided by an educational park. Freedom of choice is not a key that opens all doors to equal educational opportunities." 372 F.2d at 895–896.

En Banc Opinion: "In fulfilling this (affirmative) duty it is not enough for school authorities to offer Negro children the opportunity to attend formerly all-white schools. The necessity of overcoming the effects of the dual school system in this circuit requires integration of faculties, facilities and activities, as well as students." 380 F.2d at 389.

Other language is somewhat less mandatory in terms, as statements that mixing of students is a high priority goal and that disproportionate concentrations of Negroes cannot be ignored. But when the opinion is carefully read racial mixing is not set out as a desirable objective but as a constitutionally required result.

[6] Perhaps the range is "substantial integration" as used by the Civil Rights Commission. See n. 5 of majority opinion. 372 F.2d at 846–847.

The theory that under a free choice plan statistical imbalance alone rises to constitutional dimensions was discarded by the Eighth Circuit in Clark v. Board of Education of Little Rock, 369 F. 2d 661, 666 (8th Cir., 1966).[8] See also Deal v. Cincinnati Board of Education, 369 F. 2d 55, 62 (6th Cir. 1966):

> "[T]he mere fact of imbalance alone is not a deprivation of equality in the absence of discrimination.
>
> * * * * * * *
>
> "[B]are statistical imbalance alone is not forbidden.
>
> * * * * * * *
>
> "Appellants' right to relief depends on a showing of more than mere statistical imbalance in the Cincinnati schools."

That school desegregation cases are class actions does not add any validity to the idea of a required mixing result.[9] It may be that "[T]he right of the individual *plaintiffs* must yield to the right of Negroes as a class."[10] But the majority do not stop there. They create the rule that the freely-exercised choice of all individual members of the class must yield to the "right" of the class if exercise of choice has not produced a result agreeable to the standard of a supervising authority (judicial or administrative). But "[t]here is nothing in the Constitution which prevents his [everyone's] voluntary association with others of his race or which would strike down any state law which permits such association. The present suggestion that a Negro's right to be free from discrimination requires that the state deprive him of his volition is incongruous." Bradley v. School Board of City of Richmond, 345 F. 2d 310, 316 (4th Cir., 1965). See also, Olson v. Board of Education, 250 F. Supp. 1000, 1006 (E.D.N.Y.), appeal dismissed as moot, 367 F. 2d 565 (2d Cir., 1966): "[N]or did it [*Brown*] decide that there must be coerced integration of the races in order to accomplish educational equality for this also would require an appraisal of the effect upon the hearts and minds of those who were so coerced."

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[7] Significant testimony from HEW officials was given in Alabama NAACP State Conference of Branches et al. and United States of America v. Lurleen Burns Wallace, Governor, and John W. Gardner, as Secretary of Health, Education and Welfare of the United States, and Harold Howe II as United States Commissioner of Education, Case No. 2457–N, decided by a three-judge court on May 3, 1967 (Middle District of Alabama). 269 F. Supp. 346.

As I read that testimony HEW considers it unlikely that a fairly operated free choice plan will fail to produce transfers in numbers that it deems sufficient. But that under § 181.54 of the 1966 Guidelines the best indicator of whether the plan is working is the extent of transfers from segregated schools. That a low rate of, or lack of, transfers may lead to an administrative examination of operation of the plan, which might result in a determination that the plan is not being properly operated. That § 181.11 authorizes the Commissioner to determine the conditions under which a free choice plan is not acceptable.

There is other HEW testimony that if a school system employed a free choice plan, administered in a non-discriminatory manner in every respect, and no Negro chose transfer to a white school and no white student chose transfer to a Negro school, there would be a "technical violation" of the 1966 Guidelines and the system regarded as not in compliance. (Whether this is likely to occur is not the question. We are concerned with the scope of power, not the withholding of exercise of it.)

[8] "Though the Board has a positive duty to initiate a plan of desegregation, the constitutionality of that plan does not necessarily depend upon favorable statistics indicating positive integration of the races. The Constitution prohibits segregation of the races, the operation of a school system with dual attendance zones based upon race, and assignment of students on the basis of race to particular schools. If all of the students are, in fact, given a free and unhindered choice of schools, which is honored by the school board, it cannot be said that the state is segregating the races, operating a school with dual attendance areas or considering race in the assignment of students to their class rooms. We find no unlawful discrimination in the giving of students a free choice of schools. The system is not subject to constitutional objections simply because large segments of whites and Negroes choose to continue attending their familiar schools. It is true that statistics on actual integration may tend to prove that an otherwise constitutional system is not being constitutionally operated. However, these statistics certainly do not conclusively prove the unconstitutionality of the system itself."

* * * * * * *

"In short, the Constitution does not require a school system to force a mixing of the races in school according to some predetermined mathematical formula. Therefore, the mere presence of statistics indicating absence of total integration does not render an otherwise proper plan unconstitutional."

[9] I do not comment in detail on the majority's proposition that cases having to do with procedures for enforcement of rights and the exhaustion of administrative remedies are now to be treated as substantively creating class rights to constitutional entitlements previously considered to be valued rights of individuals. Instead I deal primarily with the additional question of whether the alleged class right can override or swallow up individual right to equal protection. "It is the individual who is entitled to the equal protection of the laws." McCabe v. Atchison, etc., 235 U.S. 151, 161, 35 S.Ct. 69, 71, 59 L.Ed. 169 (1914).

[10] The class is defined as all Negroes in a school district attending an inherently unequal school. If equal educational opportunity includes the right to a racially-mixed education with mandatory mixing if not otherwise attained, it is not clear why the class stops at district lines. Stopping at the district line is a convenient device for administration and for procedural purposes in litigation but wholly irrelevant to the quantum of constitutional entitlements.

It is asserted that freedom of choice is a privilege or means not itself reaching constitutional dimensions, as though this is an answer to whether once conferred the exercise of it may be aside. The concern is not merely whether individual privilege must give way to an overriding constitutional right, but whether individual privilege conferred upon the beneficiaries of the right as an acceptable means of meeting the constitutional requirement, and validity exercised, must give way. Exercised free choice is a benefit, and student and parents may not be deprived of that benefit on racial grounds.

Once exercised the choice is one of associates. The constitutional depths of freedom to select associates are not yet fully explored.[11] "No one can doubt that freedom of association, as a basic mechanism of the democratic process, must receive constitutional protection, and that limitations on such a fundamental freedom must be brought within the scope of constitutional safeguards." Emerson, Freedom of Association and Freedom of Expression, 74 Yale L.J. 1 (1964). Professor Emerson points out that associational rights are not derived solely from the first amendment but are implied in the whole constitutional framework for the protection of individual liberty in a free society. The right of freedom of association most frequently comes up in the context of the power of government to regulate the affairs of a group or association, NAACP v. State of Alabama ex rel. Patterson, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958), but arises also in other contexts, including the area where the associational rights are not organizational but personal in nature. It is this context which Professor Wechsler believed was the primary, but overlooked, issue in the early school segregation cases. And Professor Emerson notes, "[I]n this situation—an official proscription of personal association—the right to associate in its literal meaning comes nearest to being an absolute right untouchable by government power."

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[11] See Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv.L. Rev. 1, 33 (1959), referred to by the majority. "For me, assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate * * *."

And at 73 Harv.L.Rev. 34: "[I]f the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant. Is this not the heart of the issue involved, a conflict in human claims of high dimensions * * *. Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail?

The collision is head-on between individual freedom and paternalistic authoritarianism. No more invidious discrimination, or improper government objective, can be imagined than national power setting aside the valid exercise of choice by members of a class in the name of the constitutional objective for which the choice was granted to the class in the first place.

The cut horizontally and vertically into American life of what the majority postulate is breathtaking. There are many means by which the Negro is moving out of established patterns of segregation and entering the full current of American life. To meet the constitutional objective of juries not racially discriminatory acceptable machinery must be established to place on the jury rolls Negroes qualified for jury service. Brooks v. Beto, 366 F.2d 1 (5th Cir., 1966). In the name of the standard are Negroes (and whites too) constitutionally forbidden to exercise excuses or avail themselves of other means valid and acceptable to them of avoiding actual service? [11a] Whether Negroes are entitled to move, and wish to move, from the back of the bus is one thing; whether the power of the state is to be employed to require them to move is another. We need not speculate on the mathematical probabilities of what the exercise of choices may produce in any of these areas of life (though there is implicit in the majority position the feeling that under a valid free choice system not enough Negroes will make the choice to produce the defined goal of equal educational opportunity.) The constitutional problem is not founded in probability but power and duty of governmental authority to act regardless of probability.[12]

II

Expressions by this court of the validity and constitutionality of the 1966 Guidelines were wholly inappropriate. Because of the context and manner of that action no one can say with assurance or exactness what has been decided, what is open, and what is subject to reexamination.

Each of the seven cases before us was pending on the docket of this Court before the 1966 Guidelines were promulgated. These Guidelines were not involved in any manner in the cases when litigated in the district courts, and the parties had no opportunity to raise by normal judicial procedures and methods questions of their constitutionality and their consistency with the 1964 Act, to draw the issues and develop evidence thereon.

The Guidelines were brought into these cases for a limited purpose. The Court asked counsel to comment by supplemental briefs on the extent to which it is permissible and desirable for the courts to give weight to guidelines, and if permissible and desirable to suggest means to make them judicially effective (Opinion, Footnote 13). From this proper inquiry for comment of counsel on matters of judicial power and policy the majority have vaulted to premature pronouncements of compliance with statutory policy and to unprecedented and almost offhand statements on complex constitutional questions of vital significance to millions of our citizens.

[11a] In a criminal case against a Negro defendant the exercise by the white prosecutor of peremptory challenges so as to strike Negro jurors is not in a particular case a violation of equal protection. Swain v. State of Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). If the Negro defendant, by like exercise, removes Negro jurors is his action subject to scrutiny?

[12] Nor would the basic constitutional defect be remedied by an approach along the following line: that choice is exercised annually, and if required standards of mixing are not attained in one year the free choice plan itself might be declared unacceptable for the next year. To deprive of free choice because, on the basis of prior choices, it is feared that a required level of mixing will not be attained in the next year is no less invidious than retrospectively vitating exercise of choice that did not produce the demanded ratio.

Let it be emphasized that here, as elsewhere, the words "ratio" and "required racial mixture" and words of like import do not necessarily represent a figure exact in a mathematical sense, but the range—whatever it may be—less than the "racial balance" which the majority and HEW say they will not attempt to reach but insufficient to qualify as "equal educational opportunity." It requires no special gift of prophecy to foresee that the range will center on the suggested percentages of the Guidelines.

It is a non sequitur that a court is empowered to act on a constitutional question not before it for decision on the ground it feels it should for no court would ever do without such feeling. The doctrine of constitutional restraint is not to restrain courts that do not want to act but those that do and to protect them from the very forces and circumstances that engender a sense of urgency, create a compulsion to act and serve to rationalize action after the event.

For reasons whose soundness is beyond argument the doctrine of restraint in passing on constitutional issues is engrained in our jurisprudence. "Grave constitutional questions are matters properly to be decided by this Court but only when they inescapably come before us for adjudication. * * * [o]nly by such self-restraint will we avoid the mischief which has followed occasional departures from the principles which we profess." United States v. Rumely, 345 U.S. 41, 48, 73 S.Ct. 543, 547, 97 L.Ed. 770, 776–777 (1953).[13] This circuit consistently has recognized and honored the principle. See e.g., Gibbs v. Blackwell, 354 F. 2d 469, 471 (5th Cir., 1965); Connor v. New York Times Co., 310 F. 2d 133, 135 (5th Cir., 1962).

The Court succumbed to the temptation to reach all issues within its sight and thereby present a total package—complete, neat and with all corners square. Already it was well-established that the Guidelines are of great weight and are minimum standards. If they were to be made judicial standards in a more formal sense they could have become so subject to a determination of their constitutionality and statutory authorization at a proper time and under appropriate judicial procedures.[14] The millions affected by them are entitled to no less, nor are the public officials who must administer them, the school officials who must seek to implement them, the citizens who are assisted by them, and the courts who are to give weight to them.

The position of the United States itself exemplified that validity and constitutionality of the Guidelines were never in issue. At p. 56 of its brief for the en banc rehearing the United States said:

> "The appellees' briefs argue at considerable length that the Guidelines violate the Civil Rights Act of 1964. The North Carolina Board of Education, as *amicus curiae*, requests that the Court

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[13] "[O]nly an adjudication on the merits can provide the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision." United States v. International Union United Auto, etc., Workers, 352 U.S. 567, 591, 77 S.Ct. 529, 541, 1 L.Ed. 2d 563 (1957).

"We have consistently refrained from passing on the constitutionality of a statute until a case involving it has reached a stage where the decision of a precise constitutional issue is a necessity. * * * Many questions of a statute's constitutionality as applied can best await the refinement of the issue by pleading, contruction of the challenged statute and pleading, and, sometimes, proof." United States v. Petrillo, 332 U.S. 1, 5 and 6, 67 S.Ct. 1538, 1541, 91 L.Ed 1877 (1947).

[14] There is no way for a court to properly decide as an abstraction whether the Guidelines are such rules, regulations or orders as do not become effective until approved by the President (as required by § 602, Title VI, Civil Rights Act of 1964, 42 U.S.C.A. § 2000d–1). There must be a hearing at which there is evidence on the scope of their application.

> not consider the question of the 'validity' of the Guidelines, urging that that question is not here in issue. We agree that issue is not technically before the Court. But the question of whether the Guidelines are an appropriate guide for effective relief in a Fourteenth Amendment case is before the Court. We believe that they are, and that the Guidelines conform to Fourteenth Amendment standards."

It is especially unfortunate that the en banc court should have discussed validity and constitutionality at a time when there was pending before a three-judge court in the United States District Court for the Middle District of Alabama, Alabama NAACP State Conference of Branches, et al., and United States of America v. Lurleen Burns Wallace as Governor, et al., and John W. Gardner, as Secretary of Health, Education and Welfare of the United States, and Harold Howe II, as United States Commissioner of Education, 269 F.Supp. 346 (M.D. Ala., 1967), which had been tried, briefed, argued and was under submission awaiting decision.

In that case the constitutionality of the 1966 Guidelines had been squarely raised, a record developed,[15] and the application, effect, operation and validity of the 1966 Guidelines litigated at length, including the difficult question of presidential approval. The United States had waived sovereign immunity to the extent of consenting that Secretary of Health, Education and Welfare Gardner and Commissioner Howe be made parties defendant for the purpose of litigating these important questions. Secretary Gardner and Commissioner Howe appeared and admitted jurisdiction.

The mischief of failure to exercise requisite judicial restraint was exemplified when 2457-N was decided on May 3, 1967, for that court considered constitutionality and validity to be already decided by this Court, and a decision based on appropriate pleadings, proof and consideration was foreclosed.[16]

In my view the expressions by this Court on both constitutionality and validity were substantively erroneous. But that is immaterial to the matter of how vital questions are properly considered and determined.

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[15] The parties called 16 witnesses, submitted 40 depositions and filed approximately 800 pages of briefs. A substantial part of all this related to constitutionality of the Guidelines and whether they conformed to the intent of the 1964 Act.

[16] "After extensive briefing and full argument, the Court of Appeals for the Fifth Circuit in United States v. Jefferson County Board of Education, 372 F.2d 836, decided December 29, 1966, rehearing decided en banc March 29, 1967, 380 F.2d 385, has held that the 1966 HEW Guildelines are 'within the scope of the congressional and executive policies embodied in the Civil Rights Act of 1964.' (372 F.2d p. 857). Again the Court said: '* * * we hold that HEW's standards are substantially the same as this Court's standards. They are required by the Constitution and, as we construe them, are within the scope of the Civil Rights Act of 1964.' (p. 848.) On en banc rehearing, the Court reiterated: 'These Guidelines and our decree are within the decisions of this Court, comply with the letter and spirit of the Civil Rights Act of 1964, and meet the requirements of the United States Constitution.' (P. 389 of 380 F.2d.)

"These holdings were made deliberately and advisedly in the face of contentions that the validity of the 1966 Guidelines was not in issue. The Court ruled otherwise, holding that the courts should rely heavily upon the Guidelines and should model their standards after those promulgated by the executive (372 F.2d p. 852), and that 'these Guidelines establish minimum standards clearly applicable to disestablishing state-sanctioned segregation.' (opinion on en banc rehearing p. 389 of 380 F.2d.)" Alabama NAACP State of Conference of Branches, et al., v. Wallace, 269 F.Supp. 846, 350 (M.D.Ala., 1967).

SUPREME COURT OF THE UNITED STATES

No. 695.—October Term, 1967.

Charles C. Green et al.
v.
County School Board of New Kent County, Virginia, et al.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[May 27, 1968.]

Mr. Justice Brennan delivered the opinion of the Court.

The question for decision is whether, under all the circumstances here, respondent School Board's adoption of a "freedom-of-choice" plan which allows a pupil to choose his own public school constitutes adequate compliance with the Board's responsibility "to achieve a system of determining admission to the public schools on a nonracial basis . . . ." *Brown* v. *Board of Education,* 349 U. S. 294, 300–301 *(Brown II)*.

Petitioners brought this action in March 1965 seeking injunctive relief against respondent's continued maintenance of an alleged racially segregated school system. New Kent County is a rural county in Eastern Virginia. About one-half of its population of some 4,500 are Negroes. There is no residential segregation in the county; persons of both races reside throughout. The school system has only two schools, the New Kent school on the east side of the county and the George W. Watkins school on the west side. In a memorandum filed May 17, 1966, the District Court found that the "school system serves approximately 1,300 pupils, of which 740 are Negro and 550 are white. The School Board operates one white combined elementary and high school [New Kent], and one Negro combined elementary and high school [George W. Watkins]. There are no attendance zones. Each school serves the entire county." The record indicates that 21 school buses—11 serving the Watkins school and 10 serving the New Kent school—travel overlapping routes throughout the county to transport pupils to and from the two schools.

The segregated system was initially established and maintained under the compulsion of Virginia constitutional and statutory provisions mandating racial segregation in public education, Va. Const., Art. IX, § 140 (1902); Va. Code § 22–221 (1950). These provisions were held to violate the Federal Constitution in *Davis* v. *County School Board of Prince Edward County,* decided with *Brown* v. *Board of Education,* 347 U. S. 483, 487 (*Brown I*). The respondent School Board continued the segregated operation of the system after the *Brown* decisions, presumably on the authority of several statutes enacted by Virginia in resistance to those decisions. Some of these statutes were held to be unconstitutional on their face or as applied.[1] One statute, the Pupil Placement Act, Va. Code § 22–232.1 *et seq.* (1964), not repealed until 1966, divested local boards of authority to assign children to particular schools and placed that authority in a State Pupil Placement Board. Under that Act children were each year automatically reassigned to the school previously attended unless upon their application the State Board assigned them to another school; students seeking enrollment for the first time were also assigned at the discretion of the State Board. To September 1964, no Negro pupil had applied for admission to the New Kent school under this statute and no white pupil had applied for admission to the Watkins school.

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[1] *E. g., Griffin* v. *County School Board of Prince Edward County,* 377 U. S. 218; *Green* v. *School Board of City of Roanoke,* 304 F. 2d 118 (C. A. 4th Cir. 1962); *Adkins* v. *School Board of City of Newport News,* 148 F. Supp. 430 (D. C. E. D. Va.), aff'd, 246 F. 2d 325 (C. A. 4th Cir. 1957); *James* v. *Almond,* 170 F. Supp. 331 (D. C. E. D. Va. 1959); *Harrison* v. *Day,* 200 Va. 439, 106 S. E. 2d 636 (1959).

The School Board initially sought dismissal of this suit on the ground that petitioners had failed to apply to the State Board for assignment to New Kent school. However on August 2, 1965, five months after the suit was brought, respondent School Board, in order to remain eligible for federal financial aid, adopted a "freedom-of-choice" plan for desegregating the schools.[2] Under that plan, each pupil may annually choose between the New Kent and Watkins schools and, except for the first and eighth grades, pupils not making a choice are assigned to the school previously attended; first and eighth grade pupils must affirmatively choose a school. After the plan was filed the District Court denied petitioner's prayer for an injunction and granted respondent leave to submit an amendment to the plan with respect to employment and assignment of teachers and staff on a racially nondiscriminatory basis. The amendment was duly filed and on June 28, 1966, the District Court approved the "freedom-of-choice" plan as so amended. The Court of Appeals for the Fourth Circuit, *en banc*, 382 F. 2d 326, 338,[3] affirmed the District Court's approval of the "freedom-of-choice" provisions of the plan but remanded the case to the District Court for entry of an order regarding faculty "which is much more specific and more comprehensive" and which would incorporate in addition to a "minimal, objective time table" some of the faculty provisions of the decree entered by the Court of Appeals for the Fifth Circuit in *United States* v. *Jefferson County Board of Education*, 372 F. 2d 836, aff'd *en banc*, 380 F. 2d 385 (1967). Judges Sobeloff and Winters concurred with the remand on the teacher issue but otherwise disagreed, expressing the view "that the District Court should be directed . . . also to set up procedures for periodically evaluating the effectiveness of the [Board's] 'freedom of choice' [plan] in the elimination of other features of a segregated school system." 382 F. 2d, at 330. We granted certiorari, 389 U. S. 1003.

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[2] Congress, concerned with the lack of progress in school desegregation, included provisions in the Civil Rights Act of 1964 to deal with the problem through various agencies of the Federal Government. 42 U. S. C. §§ 2000c *et seq.*, 2000d *et seq.*, 2000h–2. In Title VI Congress declared that

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U. S. C. § 2000d.

The Department of Health, Education, and Welfare issued regulations covering racial discrimination in federally aided school systems, as directed by 42 U. S. C. § 2000d–1, and in a statement of policies, or "guidelines," the Department's Office of Education established standards according to which school systems in the process of desegregation can remain qualified for federal funds. 45 CFR §§ 80.1–80.13, 181.1–181.76 (1967). "Freedom-of-choice" plans are among those considered acceptable, so long as in operation such a plan proves effective. 45 CFR § 181.54. The regulations provide that a school system "subject to a final order of a court of the United States for the desegregation of such school . . . system" with which the system agrees to comply is deemed to be in compliance with the statute and regulations. 45 CFR § 80.4 (c). See also 45 CFR § 181.6. See generally Dunn, Title VI, the Guidelines and School Desegregation in the South, 53 Va. L. Rev. 42 (1967); Note, 55 Geo. L. J. 325 (1966); Comment, 77 Yale L. J. 321 (1967).

The pattern of separate "white" and "Negro" schools in the New Kent County school system established under compulsion of state laws is precisely the pattern of segregation to which *Brown I* and *Brown II* were particularly addressed, and which *Brown I* declared unconstitutionally denied Negro school children equal protection of the laws. Racial identification of the system's schools was complete, extending not just to the composition of student bodies at the two schools but to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities. In short, the State, acting through the local school board and school officials, organized and operated a dual system, part "white" and part "Negro."

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[3] This case was decided *per curiam* on the basis of the opinion in *Bowman* v. *County School Board of Charles City County*, 382 F. 2d 326, decided the same day. Certiorari has not been sought for the *Bowman* case itself.

It was such dual systems that 14 years ago *Brown I* held unconstitutional and a year later *Brown II* held must be abolished; school boards operating such school systems were *required* by *Brown II* "to effectuate a transition to a racially nondiscriminatory school system." 349 U. S., at 301. It is of course true that for the time immediately after *Brown II* the concern was with making an initial break in a long-established pattern of excluding Negro children from schools attended by white children. The principal focus was on obtaining for those Negro children courageous enough to break with tradition a place in the "white" schools. See, *e. g., Cooper* v. *Aaron*, 358 U. S. 1. Under *Brown II* that immediate goal was only the first step, however. The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about; it was because of the "complexities arising from the transition to a system of public education freed of racial discrimination" that we provided for "all deliberate speed" in the implementation of the principles of *Brown I*. 349 U. S., at 299–301. Thus we recognized the task would necessarily involve solution of "varied local school problems." *Id.*, at 299. In referring to the "personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis," we also noted that "[t]o effectuate this interest may call for elimination of a variety of obstacles in making the transition . . . ." *Id.*, at 300. Yet we emphasized that the constitutional rights of

Negro children required school officials to bear the burden of establishing that additional time to carry out the ruling in an effective manner "is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date." *Ibid.* We charged the district courts in their review of particular situations to

> "consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system." *Id.*, at 300–301.

It is against this background that 13 years after *Brown II* commanded the abolition of dual systems we must measure the effectiveness of respondent School Board's "freedom-of-choice" plan to achieve that end. The School Board contends that it has fully discharged its obligation by adopting a plan by which every student, regardless of race, may "freely" choose the school he will attend. The Board attempts to cast the issue in its broadest form by arguing that its "freedom-of-choice" plan may be faulted only by reading the Fourteenth Amendment as universally requiring "compulsory integration," a reading it insists the wording of the Amendment will not support. But that argument ignores the thrust of *Brown II.* In the light of the command of that case, what is involved here is the question whether the Board has achieved the "racially nondiscriminatory school system" *Brown II* held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system. In the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board opened the doors of the former "white" school to Negro children and of the "Negro" school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system. *Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. See *Cooper* v. *Aaron, supra,* at 7; *Bradley* v. *School Board,* 382 U. S. 103; cf. *Watson* v. *City of Memphis,* 373 U. S. 523. The constitutional rights of Negro school children articulated in *Brown I* permit no less than this; and it was to this end that *Brown II* commanded school boards to bend their efforts.[4]

In determining whether respondent School Board met that command by adopting its "freedom-of-choice" plan, it is relevant that this first step did not come until some 11 years after *Brown I* was decided and 10 years after *Brown II* directed the making of a "prompt and reasonable start." This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system. Such delays are no longer tolerable, for "the governing constitutional principles no longer bear the imprint of newly enunciated doctrine." *Watson* v. *City of Memphis, supra,* at 529; see *Bradley* v. *School Board, supra; Rogers* v. *Paul,* 382 U. S. 198. Moreover, a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable. "The time for mere 'deliberate speed' has run out," *Griffin* v. *County School Board,* 377 U. S. 218, 234; "the context in which we must interpret and apply this language [of *Brown II*] to plans for desegregation has been significantly altered." *Goss* v. *Board of Education,* 373 U. S. 683, 689. See *Calhoun* v. *Latimer,* 377 U. S. 263. The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now.*

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[4] "We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discriminations in the future." *Louisiana* v. *United States,* 380 U. S. 145, 154. Compare the remedies discussed in, *e. g., NLRB* v. *Newport News Shipbuilding & Dry Dock Co.,* 308 U. S. 241; *United States* v. *Crescent Ameusement Co.,* 323 U. S. 173; *United States* v. *Standard Oil Co.,* 221 U. S. 1. See also *Griffin* v. *County School Board,* 377 U. S. 218, 232–234.

The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness. Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system "at the earliest practicable date," then the plan may be said to provide effective relief. Of course, where other, more promising courses of action are open to the board, that may indicate a lack of good faith; and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method. Moreover, whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed. See No. 805, *Raney* v. *Board of Education, post,* at p. 5.

We do not hold that "freedom of choice" can have no place in such a plan. We do not hold that a "freedom-of-choice" plan might of itself be unconstitutional, although that argument has been urged upon us. Rather, all we decide today is that in desegregating a dual system a plan utilizing "freedom of choice" is not an end in itself. As Judge Sobeloff has put it,

> " 'Freedom of choice' is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a 'unitary, nonracial system.' " *Bowman* v. *County School Board,* 382 F. 2d 326, 333 (C. A. 4th Cir. 1967) (concurring opinion). Accord, *Kemp* v. *Beasley,* 389 F. 2d 178 (C. A. 8th Cir. 1968); *United States* v. *Jefferson County Board of Education, supra.*

Although the general experience under "freedom of choice" to date has been such as to indicate its ineffectiveness as a tool of desegregation,[5] there may well be in-

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[5] The views of the United States Commission on Civil Rights, which we neither adopt nor refuse to adopt, are as follows:

"Freedom of choice plans, which have tended to perpetuate racially identifiable schools in the Southern and border States, require stances in which it can serve as an effective device. Where it offers real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, nonracial system there might be no objection to allowing such a device to prove itself in operation. On the other hand, if there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a

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affirmative action by both Negro and white parents and pupils before such disestablishment can be achieved. There are a number of factors which have prevented such affirmative action by substantial numbers of parents and pupils of both races:

"(a) Fear of retaliation and hostility from the white community continue to deter many Negro families from choosing formerly all-white schools;

"(b) During the past school year [1966–1967], as in the previous year, in some areas of the South, Negro families with children attending previously all-white schools under free choice plans were targets of violence, threats of violence and economic reprisals by white persons and Negro children were subjected to harassment by white classmates notwithstanding conscientious efforts by many teachers and principals to prevent such misconduct;

"(c) During the past school year, in some areas of the South public officials improperly influenced Negro families to keep their children in Negro schools and excluded Negro children attending formerly all-white schools from official functions;

"(d) Poverty deters many Negro families in the South from choosing formerly all-white schools. Some Negro parents are embarrassed to permit their children to attend such schools without suitable clothing. In some districts special fees are assessed for courses which are available only in the white schools;

"(e) Improvements in facilities and equipment . . . have been instituted in all-Negro schools in some school districts in a manner that tends to discourage Negroes from selecting white schools."

Southern School Desegregation, 1966–1967, at 88 (1967). See *id.*, at 45–69; Survey of School Desegregation in the Southern and Border States 1965–1966, at 30–44, 51–52 (U. S. Comm'n on Civil Rights 1966).

unitary, nonracial school system, "freedom of choice" must be held unacceptable.

The New Kent School Board's "freedom-of-choice" plan cannot be accepted as a sufficient step to "effectuate a transition" to a unitary system. In three years of operation not a single white child has chosen to attend Watkins school and although 115 Negro children enrolled in New Kent school in 1967 (up from 35 in 1965 and 111 in 1966) 85% of the Negro children in the system still attend the all-Negro Watkins school. In other words, the school system remains a dual system. Rather than further the dismantling of the dual system, the plan has operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board. The Board must be required to formulate a new plan and, in light of other courses which appear open to the Board, such as zoning,[6] fashion steps

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[6] "In view of the situation found in New Kent County, where there is no residential segregation, the elimination of the dual school system and the establishment of a 'unitary, non-racial system' could be readily achieved with a minimum of administrative difficulty by means of geographic zoning—simply by assigning students living in the eastern half of the county to the New Kent School and those living in the western half of the county to the Watkins School. Although a geographical formula is not universally appropriate, it is evident that here the Board, by separately busing Negro children across the entire county to the 'Negro' school, and the white children to the 'white' school, is deliberately maintaining a segregated system which would vanish with non-racial geographic zoning. The conditions in this county present a classical case for this expedient." *Bowman* v. *County School Board*, *supra*, n. 3, at 332 (concurring opinion).

Petitioners have also suggested that the Board could consolidate the two schools, one site (*e. g.*, Watkins) serving grades 1–7 and the other (*e. g.*, New Kent) serving grades 8–12, this being the grade division respondent makes between elementary and secondary levels. Petitioners contend this would result in a more efficient which promise realistically to convert promptly to a system without a "white" school and a "Negro" school, but just schools.

The judgment of the Court of Appeals is vacated insofar as it affirmed the District Court and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

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system by eliminating costly duplication in this relatively small district while at the same time achieving immediate dismantling of the dual system.

These are two suggestions the District Court should take into account upon remand, along with any other proposed alternatives and in light of considerations respecting other aspects of the school system such as the matter of faculty and staff desegregation remanded to the court by the Court of Appeals.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SWANN ET AL. *v.* CHARLOTTE-MECKLENBURG BOARD OF EDUCATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 281. Argued October 12, 1970—Decided April 20, 1971*

The Charlotte-Mecklenburg school system, which includes the city of Charlotte, North Carolina, had more than 84,000 students in 107 schools in the 1968–1969 school year. Approximately 29% (24,000) of the pupils were Negro, about 14,000 of whom attended 21 schools that were at least 99% Negro. This resulted from a desegregation plan approved by the District Court in 1965, at the commencement of this litigation. In 1968 petitioner Swann moved for further relief based on *Green* v. *County School Board*, 391 U. S. 430, which required school boards to "come forward with a plan that promises realistically to work . . . *now* . . . until it is clear that state-imposed segregation has been completely removed." The District Court ordered the school board in April 1969 to provide a plan for faculty and student desegregation. Finding the board's submission unsatisfactory, the District Court appointed an expert to submit a desegregation plan. In February 1970, the expert and the board presented plans, and the court adopted the board's plan, as modified, for the junior and senior high schools, and the expert's proposed plan for the elementary schools. The Court of Appeals affirmed the District Court's order as to faculty desegregation and the secondary school plans, but vacated the order respecting elementary schools, fearing that the provisions for pairing and grouping of elementary schools would unreasonably burden the pupils and the board. The case was remanded to the District Court for reconsideration and submission of further plans. This Court granted certiorari and di-

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*Together with No. 349, *Charlotte-Mecklenburg Board of Education et al.* v. *Swann et al.*, also on certiorari to the same court.

rected reinstatement of the District Court's order pending further proceedings in that court. On remand the District Court received two new plans, and ordered the board to adopt a plan, or the expert's plan would remain in effect. After the board "acquiesced" in the expert's plan, the District Court directed that it remain in effect. *Held:*

1. Today's objective is to eliminate from the public schools all vestiges of state-imposed segregation that was held violative of equal protection guarantees by *Brown* v. *Board of Education,* 347 U. S. 483, in 1954. Pp. 10–11.

2. In default by the school authorities of their affirmative obligation to proffer acceptable remedies, the district courts have broad power to fashion remedies that will assure unitary school systems. Pp. 11–12.

3. Title IV of the Civil Rights Act of 1964 does not restrict or withdraw from the federal courts their historic equitable remedial powers. The proviso in 42 U. S. C. § 2000c–6 was designed simply to foreclose any interpretation of the Act as expanding the existing powers of the federal courts to enforce the Equal Protection Clause. Pp. 12–13.

4. Policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities are among the most important indicia of a segregated system, and the first remedial responsibility of school authorities is to eliminate invidious racial distinctions in those respects. Normal administrative practice should then produce schools of like quality, facilities, and staffs. P. 14.

5. The Constitution does not prohibit district courts from using their equity power to order assignment of teachers to achieve a particular degree of faculty desegregation. *United States* v. *Montgomery County Board of Education,* 395 U. S. 225, was properly followed by the lower courts in this case. Pp. 14–16.

6. In devising remedies to eliminate legally imposed segregation, local authorities and district courts must see to it that future school construction and abandonment are not used and do not serve to perpetuate or re-establish a dual system. Pp. 16–17.

7. Four problem areas exist on the issue of student assignment:

(1) *Racial quotas.* The constitutional command to desegregate schools does not mean that every school in the community must always reflect the racial composition of the system as a whole; here the District Court's very limited use of the racial ratio—not as an inflexible requirement, but as a starting point

in shaping a remedy—was within its equitable discretion. Pp. 18–21.

(2) *One-race schools.* While the existence of a small number of one-race, or virtually one-race, schools does not in itself denote a system that still practices segregation by law, the court should scrutinize such schools and require the school authorities to satisfy the court that the racial composition does not result from present or past discriminatory action on their part. Pp. 21–22.

An optional majority-to-minority transfer provision has long been recognized as a useful part of a desegregation plan, and to be effective such arrangement must provide the transferring student free transportation and available space in the school to which he desires to move. P. 22.

(3) *Attendance zones.* The remedial altering of attendance zones is not, as an interim corrective measure, beyond the remedial powers of a district court. A student assignment plan is not acceptable merely because it appears to be neutral, for such a plan may fail to counteract the continuing effects of past school segregation. The pairing and grouping of noncontiguous zones is a permissible tool; judicial steps going beyond contiguous zones should be examined in light of the objectives to be sought. No rigid rules can be laid down to govern conditions in different localities. Pp. 23–25.

(4) *Transportation.* The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not effectively dismantle the dual school system is supported by the record, and the remedial technique of requiring bus transportation as a tool of school desegregation was within that court's power to provide equitable relief. An objection to transportation of students may have validity when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process; limits on travel time will vary with many factors, but probably with none more than the age of the students. Pp. 25–27.

8. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once a unitary system has been achieved. Pp. 27–28.

431 F. 2d 138, affirmed as to those parts in which it affirmed the District Court's judgment. The District Court's order of August 7, 1970, is also affirmed.

Burger, C. J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 281 and 349.—October Term, 1970

James E. Swann et al., Petitioners,
281 *v.*
Charlotte-Mecklenburg Board of Education et al.

Charlotte-Mecklenburg Board of Education et al., Petitioners,
349 *v.*
James E. Swann et al.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[April 20, 1971]

Mr. Chief Justice Burger delivered the opinion of the Court.

We granted certiorari in this case to review important issues as to the duties of school authorities and the scope of powers of federal courts under this Court's mandates to eliminate racially separate public schools established and maintained by state action. *Brown* v. *Board of Education,* 347 U. S. 483 (1954).

This case and those argued with it [1] arose in states having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race. That was what *Brown* v. *Board of Education* was all about. These cases present us with the problem of defining in more precise terms than heretofore the scope of the duty of school authorities and district courts in implementing *Brown I* and the mandate to eliminate dual systems and establish unitary systems at once. Meanwhile district courts and courts of appeals have struggled in hundreds of cases with a multitude and variety of problems under this Court's general directive. Understandably, in an area of evolving remedies, those courts had to improvise and experiment without detailed or specific guidelines. This Court, in *Brown I*, appropriately dealt with the large constitutional principles; other federal courts had to grapple with the flinty, intractable realities of day-to-day implementation of those constitutional commands. Their efforts, of necessity, embraced a process of "trial and error," and our effort to formulate guidelines must take into account their experience.

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[1] *McDaniel* v. *Barresi,* No. 420; *Davis* v. *Board of School Commissioners of Mobile County,* No. 436; *Moore* v. *Charlotte-Mecklenburg Board of Education,* No. 444; *North Carolina State Board of Education* v. *Swann,* No. 498. For purposes of this opinion the cross-petitions in Nos. 281 and 349 are treated as a single case and will be referred to as "this case."

I

The Charlotte-Mecklenburg school system, the 43d largest in the Nation, encompasses the city of Charlotte and surrounding Mecklenburg County, North Carolina. The area is large—550 square miles—spanning roughly 22 miles east-west and 36 miles north-south. During the 1968–1969 school year the system served more than 84,000 pupils in 107 schools. Approximately 71% of the pupils were found to be white and 29% Negro. As of June 1969 there were approximately 24,000 Negro students in the system, of whom 21,000 attended schools within the city of Charlotte. Two-thirds of those 21,000—approximately 14,000 Negro students—attended 21 schools which were either totally Negro or more than 99% Negro.

This situation came about under a desegregation plan approved by the District Court at the commencement of the present litigation in 1965, 243 F. Supp. 667 (WDNC), aff'd, 369 F. 2d 29 (CA4 1966), based upon geographic zoning with a free transfer provision. The present proceedings were initiated in September 1968 by Petitioner Swann's motion for further relief based on *Green* v. *County School Board,* 391 U. S. 430 (1968), and its companion cases.[2] All parties now agree that in 1969 the system fell short of achieving the unitary school system that those cases require.

The District Court held numerous hearings and received voluminous evidence. In addition to finding certain actions of the school board to be discriminatory, the court also found that residential patterns in the city and county resulted in part from federal, state, and local government action other than school board decisions. School board action based on these patterns, for example, by locating schools in Negro residential areas and fixing the size of the schools to accommodate the needs of immediate neighborhoods, resulted in segregated education. These findings were subsequently accepted by the Court of Appeals.

In April 1969 the District Court ordered the school board to come forward with a plan for both faculty and student desegregation. Proposed plans were accepted by the court in June and August 1969 on an interim basis only, and the board was ordered to file a third plan by November 1969. In November the board moved for an extension of time until February 1970, but when that was denied the board submitted a partially completed plan. In December 1969 the District Court held that the board's submission was unacceptable and appointed an expert in education administration, Dr. John Finger, to prepare a desegregation plan. Thereafter in February 1970, the District Court was presented with two alternative pupil assignment plans—the finalized "board plan" and the "Finger plan."

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[2] *Raney* v. *Board of Education,* 391 U. S. 443 (1968), and *Monroe* v. *Board of Commissioners,* 391 U. S. 450 (1968).

The Board Plan. As finally submitted, the school board plan closed seven schools and reassigned their pupils. It restructured school attendance zones to achieve greater racial balance but maintained existing grade structures and rejected techniques such as pairing and clustering as part of a desegregation effort. The plan created a single athletic league, eliminated the previously racial basis of the school bus system, provided racially mixed faculties and administrative staffs, and modified its free transfer plan into an optional majority-to-minority transfer system.

The board plan proposed substantial assignment of Negroes to nine of the system's 10 high schools, producing 17% to 36% Negro population in each. The projected Negro attendance at the 10th school, Independence, was 2%. The proposed attendance zones for the high schools were typically shaped like wedges of a pie, extending outward from the center of the city to the suburban and rural areas of the county in order to afford residents of the center city area access to outlying schools.

As for junior high schools, the board plan rezoned the 21 school areas so that in 20 the Negro attendance would range from 0% to 38%. The other school, located in the heart of the Negro residential area, was left with an enrollment of 90% Negro.

The board plan with respect to elementary schools relied entirely upon gerrymandering of geographic zones. More than half of the Negro elementary pupils were left in nine schools that were 86% to 100% Negro; approximately half of the white elementary pupils were assigned to schools 86% to 100% white.

The Finger Plan. The plan submitted by the court-appointed expert, Dr. Finger, adopted the school board zoning plan for senior high schools with one modification: it required that an additional 300 Negro students be transported from the Negro residential area of the city to the nearly all-white Independence High School.

The Finger plan for the junior high schools employed much of the rezoning plan of the board, combined with the creation of nine "satellite" zones.[3] Under the satellite plan, inner-city Negro students were assigned by attendance zones to nine outlying predominately white junior high schools, thereby substantially desegregating every junior high school in the system.

The Finger plan departed from the board plan chiefly in its handling of the system's 76 elementary schools. Rather than relying solely upon geographic zoning, Dr. Finger proposed use of zoning, pairing, and grouping techniques, with the result that student bodies throughout the system would range from 9% to 38% Negro.[4]

The District Court described the plan thus:

> "Like the Board plan, the Finger plan does as much by rezoning school attendance lines as can reasonably be accomplished. However, unlike the board plan, it does not stop there. It goes further and desegregates all the rest of the elementary schools by the technique of grouping two or three outlying schools

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[3] A "satellite zone" is an area which is not contiguous with the main attendance zone surrounding the school.

[4] In its opinion and order of December 1, 1969, later incorporated in the order appointing Dr. Finger as consultant, the District Court stated:

"Fixed ratios of pupils in particular schools will not be set. If the board in one of its three tries had presented a plan for desegregation, the court would have sought ways to approve variations in pupil ratios. In default of such a plan from the school board, the court will start with the thought . . . that efforts should be made to reach a 71–29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but to understand that variations from that norm may be unavoidable."

> with one black inner city school; by transporting black students from grades one through four to the outlying white schools; and by transporting white students from the fifth and sixth grades from the outlying white schools to the inner city black school."

Under the Finger plan, nine inner-city Negro schools were grouped in this manner with 24 suburban white schools.

On February 5, 1970, the District Court adopted the board plan, as modified by Dr. Finger, for the junior and senior high schools. The court rejected the board elementary school plan and adopted the Finger plan as presented. Implementation was partially stayed by the Court of Appeals for the Fourth Circuit on March 5, and this Court declined to disturb the Fourth Circuit's order, 397 U. S. 978 (1970).

On appeal the Court of Appeals affirmed the District Court's order as to faculty desegregation and the secondary school plans, but vacated the order respecting elementary schools. While agreeing that the District Court properly disapproved the board plan concerning these schools, the Court of Appeals feared that the pairing and grouping of elementary schools would place an unreasonable burden on the board and the system's pupils. The case was remanded to the District Court for reconsideration and submission of further plans. This Court granted certiorari, 399 U. S. 926, and directed reinstatement of the District Court's order pending further proceedings in that court.

On remand the District Court received two new plans for the elementary schools: a plan prepared by the United States Department of Health, Education, and Welfare (the HEW plan) based on contiguous grouping and zoning of schools, and a plan prepared by four members of the nine-member school board (the minority plan) achieving substantially the same results as the Finger plan but apparently with slightly less transportation. A majority of the school board declined to amend its proposal. After a lengthy evidentiary hearing the District Court concluded that its own plan (the Finger plan), the minority plan, and an earlier draft of the Finger plan were all reasonable and acceptable. It directed the board to adopt one of the three or in the alternative to come forward with a new, equally effective plan of its own; the court ordered that the Finger plan would remain in effect in the event the school board declined to adopt a new plan. On August 7, the board indicated it would "acquiesce" in the Finger plan, reiterating its view that the plan was unreasonable. The District Court, by order dated August 7, 1970, directed that the Finger plan remain in effect.

II

Nearly 17 years ago this Court held, in explicit terms, that state-imposed segregation by race in public schools denies equal protection of the laws. At no time has the Court deviated in the slightest degree from that holding or its constitutional underpinnings. None of the parties before us challenges the Court's decision of May 17, 1954, that

> "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. . . .
>
> "Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity." *Brown* v. *Board of Education, supra,* at 495.

None of the parties before us questions the Court's 1955 holding in *Brown II*, that

> "[s]chool authorites have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.
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> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibilty in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown* v. *Board of Education*, 349 U. S. 294, 299–300 (1955).

Over the 15 years since *Brown II*, many difficulties were encountered in implementation of the basic constitutional requirement that the State not discriminate between public school children on the basis of their race. Nothing in our national experience prior to 1955 prepared anyone for dealing with changes and adjustments of the magnitude and complexity encountered since then. Deliberate resistance of some to the Court's mandates has impeded the good-faith efforts of others to bring school systems into compliance. The detail and nature of these dilatory tactics have been noted frequently by this Court and other courts.

By the time the Court considered *Green* v. *County School Board,* 391 U. S. 430, in 1968, very little progress had been made in many areas where dual school systems had historically been maintained by operation of state laws. In *Green,* the Court was confronted with a record of a freedom-of-choice program that the District Court had found to operate in fact to preserve a dual system more than a decade after *Brown II.* While acknowledging that a freedom-of-choice concept could be a valid remedial measure in some circumstances, its failure to be effective in *Green* required that

> "The burden on a school board today is to come forward with a plan that promises realistically to work . . . *now* . . . until it is clear that state-imposed segregation has been completely removed." *Green,* at 439.

This was plain language, yet the 1969 Term of Court brought fresh evidence of the dilatory tactics of many school authorities. *Alexander* v. *Holmes County Board of Education,* 396 U. S. 19, restated the basic obligation asserted in *Griffin* v. *School Board,* 377 U. S. 218, 234 (1964), and *Green, supra,* that the remedy must be implemented *forthwith.*

The problems encountered by the district courts and courts of appeals make plain that we should now try to amplify guidelines, however incomplete and imperfect, for the assistance of school authorities and courts.[5] The failure of local authorities to meet their constitutional obligations aggravated the massive problem of converting from the state-enforced discrimination of racially separate school systems. This process has been rendered more difficult by changes since 1954 in the structure and patterns of communities, the growth of student population,[6] movement of families, and other changes, some of which had marked impact on school planning, sometimes neutralizing or negating remedial action before it was fully implemented. Rural areas accustomed for half a century to the consolidated school systems implemented by bus transportation could make adjustments more readily than metropolitan areas with dense and shifting population, numerous schools, congested and complex traffic patterns.

III

The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measures of *Brown II*. That was the basis for the holding in *Green* that school authorities are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U. S., at 437–438.

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[5] The necessity for this is suggested by the situation in the Fifth Circuit where 166 appeals in school desegregation cases were heard between December 2, 1969, and September 24, 1970.

[6] Elementary public school population (grades 1–6) grew from 17,447,000 in 1954 to 23,103,000 in 1969; secondary school population grew from 11,183,000 in 1954 to 20,775,000 in 1969. Digest of Educational Statistics, 1964 ed. 1, 6, Office of Education Publication # 10024–64; Digest of Educational Statistics, 1970 ed. Table 28, Office of Education Publication # 10024–70.

If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co.* v. *Bowles,* 321 U. S. 329–330 (1944), cited in *Brown II, supra,* at 300.

This allocation of responsibility once made, the Court attempted from time to time to provide some guidelines for the exercise of the district judge's discretion and for the reviewing function of the courts of appeals. However, a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.

In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court. As with any equity case, the nature of the violation determines the scope of the remedy. In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system.

The school authorities argue that the equity powers of federal district courts have been limited by Title IV of the Civil Rights Act of 1964, 42 U. S. C. § 2000c. The language and the history of Title IV shows that it was not enacted to limit but to define the role of the Federal Government in the implementation of the *Brown I* decision. It authorizes the Commissioner of Education to provide technical assistance to local boards in the preparation of desegregation plans, to arrange "training institutes" for school personnel involved in desegregation efforts, and to make grants directly to schools to ease the transition to unitary systems. It also authorizes the Attorney General, in specified circumstances, to initiate federal desegregation suits. Section 2000c (b) defines "desegregation" as it is used in Title IV:

> " 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of

> students to public schools in order to overcome racial imbalance."

Section 2000c–6, authorizing the Attorney General to institute federal suits, contains the following proviso:

> "nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards."

On their face, the sections quoted purport only to insure that the provisions of Title IV of the Civil Rights Act of 1964 will not be read as granting new powers. The proviso in § 2000c–6 is in terms designed to foreclose any interpretation of the Act as expanding the *existing* powers of federal courts to enforce the Equal Protection Clause. There is no suggestion of an intention to restrict those powers or withdraw from courts their historic equitable remedial powers. The legislative history of Title IV indicates that Congress was concerned that the Act might be read as creating a right of action under the Fourteenth Amendment in the situation of so-called "de facto segregation," where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities. In short, there is nothing in the Act which provides us material assistance in answering the question of remedy for state-imposed segregation in violation of *Brown I.* The basis of our decision must be the prohibition of the Fourteenth Amendment that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

IV

We turn now to the problem of defining with more particularity the responsibilities of school authorities in desegregating a state-enforced dual school system in light of the Equal Protection Clause. Although the several related cases before us are primarily concerned with problems of student assignment, it may be helpful to begin with a brief discussion of other aspects of the process.

In *Green*, we pointed out that existing policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities were among the most important indicia of a segregated system. 391 U. S., at 435. Independent of student assignment, where it is possible to identify a "white school" or a "Negro school" simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown.

When a system has been dual in these respects, the first remedial responsibility of school authorities is to eliminate invidious racial distinctions. With respect to such matters as transportation, supporting personnel, and extracurricular activities, no more than this may be necessary. Similar corrective action must be taken with regard to the maintenance of buildings and the distribution of equipment. In these areas, normal administrative practice should produce schools of like quality, facilities, and staffs. Something more must be said, however, as to faculty assignment and new school construction.

In the companion *Davis* case, the Mobile school board has argued that the Constitution requires that teachers be assigned on a "color blind" basis. It also argues that the Constitution prohibits district courts from using their equity power to order assignment of teachers to achieve a particular degree of faculty desegregation. We reject that contention.

In *United States* v. *Montgomery County Board of Education,* 395 U. S. 225 (1969), the District Court set as a goal a plan of faculty assignment in each school with a ratio of white to Negro faculty members substantially the same throughout the system. This order was predicated on the District Court finding that

> "The evidence does not reflect any real administrative problems involved in immediately desegregating the substitute teachers, the student teachers, the night school faculties, and in the evolvement of a really legally adequate program for the substantial desegregation of the faculties of all schools in the system commencing with the school year 1968–69." Quoted at 395 U. S., at 232.

The District Court in *Montgomery* then proceeded to set an initial ratio for the whole system of at least two Negro teachers out of each 12 in any given school. The Court of Appeals modified the order by eliminating what it regarded as "fixed mathematical ratios" of faculty and substituted an initial requirement of "substantially or approximately" a five-to-one ratio. With respect to the future, the Court of Appeals held that the numerical ratio should be eliminated and that compliance should not be tested solely by the achievement of specified proportions. *Id.,* at 234.

We reversed the Court of Appeals and restored the District Court's order in its entirety, holding that the order of the District Judge

> "was adopted in the spirit of this Court's opinion in *Green* . . . in that his plan 'promises realistically to

> work, and promises realistically to work *now.*' The modifications ordered by the panel of the Court of Appeals, while of course not intended to do so, would, we think, take from the order some of its capacity to expedite, by means of specific commands, the day when a completely unified, unitary, nondiscriminatory school system becomes a reality instead of a hope. . . . We also believe that under all the circumstances of this case we follow the original plan outlined in *Brown II* . . . by accepting the more specific and expeditious order of [District] Judge Johnson . . . ." 395 U. S., at 235–236 (emphasis in original).

The principles of *Montgomery* have been properly followed by the District Court and the Court of Appeals in this case.

The construction of new schools and the closing of old ones is one of the most important functions of local school authorities and also one of the most complex. They must decide questions of location and capacity in light of population growth, finances, land values, site availability, through an almost endless list of factors to be considered. The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner city neighborhoods.

In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown,* closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of "neighborhood zoning." Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy.

In ascertaining the existence of legally imposed school segregation, the existence of a pattern of school construction and abandonment is thus a factor of great weight. In devising remedies where legally imposed segregation has been established, it is the responsibility of local authorities and district courts to see to it that future school construction and abandonment is not used and does not serve to perpetuate or re-establish the dual system. When necessary, district courts should retain jurisdiction to assure that these responsibilities are carried out. Cf. *United States* v. *Board of Public Instruction,* 395 F. 2d 66 (CA5 1968); *Brewer* v. *School Board,* 397 F. 2d 37 (CA4 1968).

V

The central issue in this case is that of student assignment, and there are essentially four problem areas:

(1) to what extent racial balance or racial quotas may be used as an implement in a remedial order to correct a previously segregated system;

(2) whether every all-Negro and all-white school must be eliminated as an indispensable part of a remedial process of desegregation;

(3) what are the limits, if any, on the rearrangement of school districts and attendance zones, as a remedial measure; and

(4) what are the limits, if any, on the use of transportation facilities to correct state-enforced racial school segregation.

(1) *Racial Balances or Racial Quotas.*

The constant theme and thrust of every holding from *Brown I* to date is that state-enforced separation of races in public schools is discrimination that violates the Equal Protection Clause. The remedy commanded was to dismantle dual school systems.

We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. The target of the cases from *Brown I* to the present was the dual school system. The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of *Brown I* to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination. We do not reach in this case the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree. This case does not present that question and we therefore do not decide it.

Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.

In this case it is urged that the District Court has imposed a racial balance requirement of 71%–29% on individual schools. The fact that no such objective was actually achieved—and would appear to be impossible—tends to blunt that claim, yet in the opinion and order of the District Court of December 1, 1969, we find that court directing:

> "that efforts should be made to reach a 71–29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others . . . , that no school [should] be operated with an all-black or predominantly black student body, [and] that pupils of all grades [should] be assigned in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students."

The District Judge went on to acknowledge that variation "from that norm may be unavoidable." This contains intimations that the "norm" is a fixed mathematical racial balance reflecting the pupil constituency of the system. If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.

As the voluminous record in this case shows,[7] the predicate for the District Court's use of the 71%-29% ratio was twofold: first, its express finding, approved by the Court of Appeals and not challenged here, that a dual school system had been maintained by the school authorities at least until 1969; second, its finding, also approved by the Court of Appeals, that the school board had totally defaulted in its acknowledged duty to come forward with an acceptable plan of its own, notwithstanding the patient efforts of the District Judge who, on at least three occasions, urged the board to submit plans.[8] As the statement of facts shows, these findings are abundantly supported by the record. It was because of this total failure of the school board that the District Court was obliged to turn to other qualified sources, and Dr.

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[7] It must be remembered that the District Court entered nearly a score of orders, numerous sets of findings and for the most part each was accompanied by a memorandum opinion. Considering the pressure under which the court was obliged to operate we would not expect that all inconsistencies and apparent inconsistencies could be avoided. Our review, of course, is on the orders of February 5, 1970, as amended, and August 7, 1970.

[8] The final board plan left 10 schools 86% to 100% Negro and yet categorically rejected the techniques of pairing and clustering as part of the desegregation effort. As discussed below, the Charlotte board was under an obligation to exercise every reasonable effort to remedy the violation, once it was identified, and the suggested techniques are permissible remedial devices. Additionally, as noted by the District Court and Court of Appeals, the board plan refused to assign white students to any school unless the student population of that school was at least 60% white. This was an arbitrary limitation negating reasonable remedial steps.

Finger was designated to assist the District Court to do what the board should have done.

We see therefore that the use made of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement. From that starting point the District Court proceeded to frame a decree that was within its discretionary powers, an equitable remedy for the particular circumstances.[9] As we said in *Green,* a school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness. Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court.

(2) *One-Race Schools.*

The record in this case reveals the familiar phenomenon that in metropolitan areas minority groups are often found concentrated in one part of the city. In some circumstances certain schools may remain all or largely of one race until new schools can be provided or neighborhood patterns change. Schools all or predominately of one race in a district of mixed population will require close scrutiny to determine that school assignments are not part of state-enforced segregation.

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[9] In his August 3, 1970, memorandum holding that the District Court plan was "reasonable" under the standard laid down by the Fourth Circuit on appeal, the District Court explained the approach taken as follows:

"This court has not ruled, and does not rule that 'racial balance' is required under the Constitution; nor that all black schools in all cities are unlawful; nor that all school boards must bus children or violate the Constitution; *nor that the particular order entered in this case would be correct in other circumstances not before this court.*" (Emphasis in original.)

In light of the above, it should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system which still practices segregation by law. The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools. No *per se* rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominately of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

An optional majority-to-minority transfer provision has long been recognized as a useful part of every desegregation plan. Provision for optional transfer of those in the majority racial group of a particular school to other schools where they will be in the minority is an indispensable remedy for those students willing to transfer to other schools in order to lessen the impact on them of the state-imposed stigma of segregation. In order to be effective, such a transfer arrangement must grant the transferring student free transportation and space must be made available in the school to which he desires to move. Cf. *Ellis* v. *Board of Public Instruction,* 423

F. 2d 203, 206 (CA5 1970). The court orders in this and the companion *Davis* case now provide such an option.

(3) *Remedial Altering of Attendance Zones.*

The maps submitted in these cases graphically demonstrate that one of the principal tools employed by school planners and by courts to break up the dual school system has been a frank—and sometimes drastic—gerrymandering of school districts and attendance zones. An additional step was pairing, "clustering," or "grouping" of schools with attendance assignments made deliberately to accomplish the transfer of Negro students out of formerly segregated Negro schools and transfer of white students to formerly all-Negro schools. More often than not, these zones are neither compact[10] nor contiguous; indeed they may be on opposite ends of the city. As an interim corrective measure, this cannot be said to be beyond the broad remedial powers of a court.

Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.

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[10] The reliance of school authorities on the reference to the "revision of . . . attendance areas into *compact* units," *Brown II*, at 300, is misplaced. The enumeration in that opinion of considerations to be taken into account by district courts was patently intended to be suggesive rather than exhaustive. The decision in *Brown II* to remand the cases decided in *Brown I* to local courts for the framing of specific decrees was premised on a recognition that this Court could not at that time foresee the particular means which would be required to implement the constitutional principles announced. We said in *Green, supra,* at 439:

> "The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance."

No fixed or even substantially fixed guidelines can be established as to how far a court can go, but it must be recognized that there are limits. The objective is to dismantle the dual school system. "Racially neutral" assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a "loaded game board," affirmative action in the form of remedial altering of attendance zones is proper to achieve truly non-discriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral.

In this area, we must of necessity rely to a large extent, as this Court has for more than 16 years, on the informed judgment of the district courts in the first instance and on courts of appeals.

We hold that the pairing and grouping of non-contiguous school zones is a permissible tool and such action is to be considered in light of the objectives sought. Judicial steps in shaping such zones going beyond combinations of contiguous areas should be examined in light of what is said in subdivisions (1), (2), and (3) of this opinion concerning the objectives to be sought. Maps do not tell the whole story since non-contiguous school zones may be more accessible to each other in terms of the critical travel time, because of traffic patterns and good highways, than schools geographically closer together. Conditions in different localities will vary so widely that no rigid rules can be laid down to govern all situations.

(4) *Transportation of Students.*

The scope of permissible transportation of students as an implement of a remedial decree has never been defined by this Court and by the very nature of the problem it cannot be defined with precision. No rigid guidelines as to student transportation can be given for application to the infinite variety of problems presented in thousands of situations. Bus transportation has been an integral part of the public education system for years, and was perhaps the single most important factor in the transition from the one-room schoolhouse to the consolidated school. Eighteen million of the nation's public school children, approximately 39%, were transported to their schools by bus in 1969–1970 in all parts of the country.

The importance of bus transportation as a normal and accepted tool of educational policy is readily discernible in this and the companion case.[11] The Charlotte school authorities did not purport to assign students on the basis of geographically drawn zones until 1965 and then they allowed almost unlimited transfer privileges. The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system is supported by the record.

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[11] During 1967–1968, for example, the Mobile board used 207 buses to transport 22,094 students daily for an average round trip of 31 miles. During 1966–1967, 7,116 students in the metropolitan area were bussed daily. In Charlotte-Mecklenburg, the system as a whole, without regard to desegregation plans, planned to bus approximately 23,000 students this year, for an average daily round trip of 15 miles. More elementary school children than high school children were to be bussed, and four- and five-year-olds travel the longest routes in the system.

Thus the remedial techniques used in the District Court's order were within that court's power to provide equitable relief; implementation of the decree is well within the capacity of the school authority.

The decree provided that the buses used to implement the plan would operate on direct routes. Students would be picked up at schools near their homes and transported to the schools they were to attend. The trips for elementary school pupils average about seven miles and the District Court found that they would take "not over 35 minutes at the most." [12] This system compares favorably with the transportation plan previously operated in Charlotte under which each day 23,600 students on all grade levels were transported an average of 15 miles one way for an average trip requiring over an hour. In these circumstances, we find no basis for holding that the local school authorites may not be required to employ bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to the walk-in school.

An objection to transportation of students may have validity when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process. District courts must weigh the soundness of any transportation plan in light of what is said in subdivisions (1), (2), and (3) above. It hardly needs stating that the limits on time of travel will vary with many factors, but probably with none more than the age of the students. The reconcilation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets but fundamentally no more so than remedial measures courts of equity have traditionally employed.

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[12] The District Court found that the school system would have to employ 138 more buses than it had previously operated. But 105 of those buses were already available and the others could easily be obtained. Additionally, it should be noted that North Carolina requires provision of transportation for all students who are assigned to schools more than one and one-half miles from their homes. N. C. Stat. § 115-186 (b).

VI

The Court of Appeals, searching for a term to define the equitable remedial power of the district courts, used the term "reasonableness." In *Green, supra,* this Court used the term "feasible" and by implication, "workable," "effective," and "realistic" in the mandate to develop "a plan that promises realistically to work, and . . . to work *now.*" On the facts of this case, we are unable to conclude that the order of the District Court is not reasonable, feasible and workable. However, in seeking to define the scope of remedial power or the limits on remedial power of courts in an area as sensitive as we deal with here, words are poor instruments to convey the sense of basic fairness inherent in equity. Substance, not semantics, must govern, and we have sought to suggest the nature of limitations without frustrating the appropriate scope of equity.

At some point, these school authorites and others like them should have achieved full compliance with this Court's decision in *Brown I.* The systems will then be "unitary" in the sense required by our decisions in *Green* and *Alexander.*

It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.

For the reasons herein set forth, the judgment of the Court of Appeals is affirmed as to those parts in which it affirmed the judgment of the District Court. The order of the District Court dated August 7, 1970, is also affirmed.

It is so ordered.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NORTH CAROLINA STATE BOARD OF EDUCATION ET AL. *v.* SWANN ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

No. 498. Argued October 13, 1970—Decided April 20, 1971

North Carolina's Anti-Busing Law, which flatly forbids assignment of any student on account of race or for the purpose of creating a racial balance or ratio in the schools and which prohibits busing for such purposes, *held* invalid as preventing implementation of desegregation plans required by the Fourteenth Amendment. Pp. 2–4.

312 F. Supp. 503, affirmed.

BURGER, C. J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 498.—October Term, 1970

North Carolina State Board of Education et al., Appellants,
v.
James E. Swann et al.

On Appeal from the United States District Court for the Western District of North Carolina.

[April 20, 1971]

Mr. Chief Justice Burger delivered the opinion of the Court.

This case is here on direct appeal pursuant to 28 U. S. C. § 1253 from the judgment of a three-judge court in the United States District Court for the Western District of North Carolina. The District Court declared unconstitutional a portion of the North Carolina General Statutes known as the Anti-Busing Law,[1] and granted an injunction against its enforcement.[2] The proceeding before the three-judge court was an ancillary proceeding connected with the school desegregation case heretofore discussed, *Swann* v. *Charlotte-Mecklenburg, supra,* p. —.

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[1] So far as here relevant, North Carolina General Statute § 115-176.1 reads as follows:

"No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing."

[2] 312 F. Supp 503 (1970). The opinion as printed grants only declaratory relief. However the District Court amended its original opinion by withdrawing Part V and entering an order dated June 22, 1970, which enjoined all parties "from enforcing, or seeking the enforcement of," the portion of the statute found unconstitutional.

The instant appeal was taken by the North Carolina State Board of Education and four state officials. We granted the Charlotte-Mecklenburg School Board's motion to join in the appeal, 400 U. S. 804 (1970).

When the litigation in the *Swann* case recommenced in the spring of 1969, the District Court specifically directed that the school board consider altering attendance areas, pairing or consolidation of schools, bus transportation of students, and any other method which would effectuate a racially unitary system. That litigation was actively prosecuted. The board submitted a series of proposals, all rejected by the District Court as inadequate. In the midst of this litigation over the remedy to implement the District Court's order, the North Carolina Legislature enacted the anti-busing bill, set forth in relevant part in footnote 1.

Following enactment of the anti-busing statute the plaintiffs in the *Swann* case obtained leave to file a supplemental complaint which sought injunctive and declaratory relief against the statute. They sought to convene a three-judge court, but no action was taken on the requests at that time because the school board thought that the anti-busing law did not interfere with the school board's proposed plan to transport about 4,000 Negro children to white suburban schools. 306 F. Supp 1291 (WDNC 1969). Other parties were added as defendants by order of the District Court dated February 25. In addition certain persons who had brought a suit in state court to enjoin or impede the order of the federal court, the attorneys for those litigants, and state judges who at various times entered injunctions against the school authorities and blocked compliance with orders of the District Court were also joined; a three-judge court was then convened.

We observed in *Swann, ante,* p. 12, that school authorities have wide discretion in formulating school policy, and that as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements. However, if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees.

The legislation before us flatly forbids assignment of any student on account of race or for the purpose of creating a racial balance or ratio in the schools. The prohibition is absolute, and it would inescapably operate to obstruct the remedies granted by the District Court in the *Swann* case. But more important the statute exploits an apparently neutral form to control school assignment plans by directing that they be "color blind"; that requirement, against the background of segregation, would render illusory the promise of *Brown* v. *Board of Education,* 347 U. S. 483 (1954). Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems.

Similarly the flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. As we have held in *Swann,* the Constitution does not compel any particular degree of racial balance or mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful starting points in shaping a remedy. An absolute prohibition against use of such a device—even as a starting point—contravenes the implicit command of *Green* v. *County School Board,* 391 U. S. 430 (1968), that all reasonable methods be available to formulate an effective remedy.

We likewise conclude that an absolute prohibition against transportation of students assigned on the basis of race, "or for the purpose of creating a balance or ratio," will similarly hamper the ability of local authorities to effectively remedy constitutional violations. As noted in *Swann, ante,* p. 25, bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it. Cf. *McDaniel* v. *Barresi, post,* p. 3.

The remainder of the order of the District Court is affirmed for the reasons stated in its opinion, 312 F. Supp. 503.

Affirmed.